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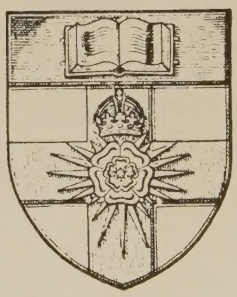

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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

HOBBS *v.* TINLING (C. T.) AND COMPANY, LIMITED.

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Feb. 7, 8, 11, 12, 13, 14; *March* 13.

[1928. H. 230.]

HOBBS *v.* NOTTINGHAM JOURNAL, LIMITED.

[1928. H. 36.]

Defamation—Libel—Justification not pleaded—Cross-examination of Plaintiff on specific Acts unconnected with the Libel—Mitigation of Damages—Communications from Jury not shown to Counsel—Absence of Summing-up—Refusal to adjourn Trial of second Action.

In an action for libel the plaintiff set out in his statement of claim the alleged libel, and in a separate paragraph alleged an innuendo which practically repeated, but somewhat extended, the statements in the alleged libel. The defendants did not plead justification or fair comment, but paid 20*s.* into Court in respect of the alleged libel as sufficient damages; they made no payment into Court in respect of the innuendo; and they gave notice under Order XXXVI., r. 37, of their intention to give in evidence certain matters in mitigation of damages. At the trial the plaintiff gave evidence that save for one

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lapse he was a man of unblemished reputation. Thereupon he was cross-examined as to specific incidents not mentioned in the libel or in the particulars served under Order XXXVI., r. 37, it being suggested that he was a man of bad reputation. This line of cross-examination was objected to, but was allowed. Before the conclusion of the cross-examination the jury intervened with an intimation that they desired to find for the defendants, which they then did without any summing-up. On appeal:—

Held, (1.) that the cross-examination was admissible as cross-examination to credit, but that if the incidents were denied by the plaintiff no further evidence could be called to rebut the plaintiff's denials, and that the jury should have been told that while they were not bound to accept the plaintiff's denials, those denials, though unaccepted, afforded no evidence that the incidents had taken place; (2) that the cross-examination was not admissible to mitigate damages, and that the jury ought to have been directed to this effect; (3.) that the jury should have been told that their intervention was premature and that they must hear the plaintiff's case to the end and be directed as to the issues they had to try; and (4.) that the trial having been in those respects unsatisfactory there must be a new trial.

Per Scrutton L.J.: Communications from the jury to the judge should be shown to the parties' counsel.

Per Sankey L.J.: While the better practice is for communications from the jury to be shown to parties' counsel, the question whether they should be shown or not is one for the discretion of the judge.

At the conclusion of a libel action in favour of the defendants the judge stated that the papers would be impounded and sent to the Public Prosecutor. Another action by the same plaintiff but against different defendants for a somewhat similar but not identical libel was the next case in the list. Counsel for the plaintiff applied for an adjournment on the ground that there was to be an appeal in the first action and also on the ground of the publicity given to the statement about the papers in that action being sent to the Public Prosecutor. The application for an adjournment was refused; the case was called on, and as no one then appeared for the plaintiff, judgment was entered for the defendants.

Held, that the judgment entered for the defendants in those circumstances must be set aside and a new trial ordered.

APPEAL from a verdict and judgment at a trial before Lord Hewart C.J. and a special jury.

The action was brought claiming damages for libel in the following circumstances: On March 9, 1925, the plaintiff was found guilty of conspiracy to defraud in connection with a successful attempt to blackmail an Indian Prince, who was called "Mr. A." at the trial. On the day after the conviction, a number of newspapers, including the defendants', published articles purporting to give the previous life history of the

plaintiff, in which a series of allegations of crime and misconduct, not connected with the offence for which he had just been convicted, were made against him. On coming out of prison after serving his sentence the plaintiff commenced a number of actions for libel against these newspapers. Some of the papers justified and afterwards settled; others did not justify, but paid a small sum into Court; others settled for sums not specified. In the present action, which was the first to come into Court, the statement of claim set out in para. 2 the alleged libel, which contained allegations of criminal or dishonest or disreputable conduct not connected with the "Mr. A." case. Para. 3 alleged an innuendo which practically repeated, but somewhat extended, the statements in the alleged libel.

The defendants did not plead justification or fair comment, but in respect of para. 2 of the statement of claim, which set out the words of the libel, they paid 20*s.* into Court as sufficient damages; they made no payment into Court in respect of the innuendo in para. 3, as to which they denied "that the words were capable of bearing the alleged meanings or any of them"; and they gave notice under Order XXXVI., r. 37, of their intention to give in evidence certain matters in mitigation of damages.

At the trial the plaintiff's counsel gave an account of the plaintiff's life before his conviction and put him forward as, apart from that, a man of unblemished reputation. Incidentally in the course of his speech counsel referred to a certain power of attorney which had been given to the plaintiff by one Appleton, a solicitor, whereupon complaint was made on behalf of the defendants that the power of attorney had not been disclosed, and must have been wilfully omitted from the plaintiff's affidavit of documents. This was denied by the plaintiff's counsel, who also contended that the power of attorney need not be disclosed, as it was not a relevant document. Some comments were made by the Lord Chief Justice on the omission of the power of attorney from the affidavit of documents, and he said that he would deal with the matter later. It afterwards appeared that the

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power of attorney had been disclosed in another action to the defendants' solicitors, who at the time had forgotten this fact.

The plaintiff then gave evidence substantially on the lines of his counsel's opening, concluding with a statement that, except in the case in connection with the Indian Prince, there had been no criminal charge made against him in his life.

Counsel for the defendants, contending that the plaintiff had put his character in issue, proceeded to cross-examine him on specific incidents not mentioned in the libel or in the particulars given by the defendants under Order XXXVI., r. 37, for the purpose of negativing the plaintiff's good reputation, to mitigate damages, and to show the circumstances under which the libel was published. This line of cross-examination was objected to, but was allowed, and was unfinished on the second day of the trial. On that day the jury made what was called a "tentative intimation" to the judge, and followed it on the third morning by a communication that they were unanimously agreed that they had heard sufficient evidence. Neither the first nor the second communication was shown to counsel. Upon this second communication being made, the Lord Chief Justice, addressing the jury, said: "Do you mean by the intimation that upon the plaintiff's own evidence you desire, if you can, to find a verdict for the defendants?" To that the jury said: "Yes, my Lord, that is our opinion." The Lord Chief Justice then said: "And may I take it that as a consequence if, as a matter of law, upon these pleadings it is necessary that there should be a verdict for the plaintiff for some amount, your verdict would be for the smallest possible amount?" To which the jury said: "Yes, my Lord." Plaintiff's counsel said that he had a right to re-examine the plaintiff; eventually he did not do so, but addressed the jury. The Lord Chief Justice did not sum up to the jury, but addressing them, and referring to their intimation, asked if they were still of the same mind, to which they answered that "We are willing to find for the defendants as far as the law permits it." Thereupon judgment was entered for the defendants.

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This action, which was brought in respect of a very similar, but not identical, libel was to be tried after the case of *Hobbs* v. *Tinling & Co., Ld.*, and the Lord Chief Justice originally proposed to proceed with it before the same jury. To this the plaintiff's counsel objected, and as no other special jury was then available the case was adjourned till the following morning, the Lord Chief Justice, however, saying "as that adjournment has taken place, I must say now what otherwise I would have said at the end of the second case. These documents are impounded and will go to the Public Prosecutor." On the following morning counsel for the plaintiff asked for an adjournment of the case on the ground that there was to be an appeal in the first case and, further, on the ground of the publicity which had been given to the statement that the documents in the first case were being sent to the Public Prosecutor. The application for an adjournment was refused, and counsel for the plaintiff thereupon left the Court. The case was called on, and as there was then no appearance for the plaintiff, judgment was entered for the defendants.

The plaintiff appealed in both cases.

Serjeant Sullivan K.C. and *Martin O'Connor* for the appellant. As to the first case the trial was so unsatisfactory that there ought to be a new trial. First, the misconception with regard to the plaintiff's affidavit of documents, and the comments made thereon, created a prejudice in the minds of the jury which was never effaced.

Secondly, the respondents were not entitled to cross-examine the appellant on matters not referred to in the notice served by them under Order XXXVI., r. 37, with the view to mitigate the damages: *Scott* v. *Sampson* (1); *Bracegirdle* v. *Bailey*. (2) Further, the cross-examination was purely as to collateral matters, and, as was said in *Tennant* v. *Hamilton* (3), "it is an acknowledged law of evidence that you cannot go

(1) (1882) 8 Q. B. D. 491. (2) (1859) 1 F. & F. 536.
(3) (1839) 7 Cl. & F. 122, 134.

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into an irrelevant inquiry for the purpose of raising a collateral issue to discredit a witness produced on the other side." Moreover the answer of a witness on a collateral issue is conclusive: *Harris* v. *Tippett*. (1)

[SCRUTTON L.J. Does that mean any more than this, that the witness cannot be contradicted?]

In *Rex* v. *Watson* (2), Lord Ellenborough said: "You may ask the witness whether he has been guilty of such a crime, this, indeed, would be improperly asked because he is not bound to criminate himself, but if he does answer promptly, you must be bound by the answer which he gives, for the Court does not sit for the purpose of examining into collateral crimes." The same principle was laid down in *Tolman* v. *Johnstone* (3); *Attorney-General* v. *Hitchcock* (4); *Goddard* v. *Parr* (5); *In re Haggenmacher's Patents*. (6) Even in mitigation of damages evidence which, if proved, would constitute a justification, is not admissible, and it makes no difference that the evidence is offered in cross-examination: *Speck* v. *Phillips* (7); *Watt* v. *Watt*. (8) The cross-examination was wholly irregular and ought to have been disallowed; but when it was allowed the judge ought to have directed the jury that in view of the plaintiff's denials of the conduct attributed to him there was no evidence that he had been guilty of misconduct, and that, in any view, the cross-examination was inadmissible to mitigate damages. In fact there was no direction to the jury at all.

Thirdly, the jury's communications to the judge ought to have been, and were not, shown to counsel.

Fourthly, the intervention of the jury was premature. They had not fully heard the case for the plaintiff and ought to have been told to suspend their judgment till the plaintiff's case was completed. In those circumstances their verdict cannot stand: *De Freville* v. *Dill* (9); *Bray* v. *Ford*. (10)

(1) (1811) 2 Camp. 637.
(2) (1817) 2 Stark. 116, 151.
(3) (1860) 2 F. & F. 66.
(4) (1847) 1 Ex. 91, 103.
(5) (1855) 24 L. J. (Ch.) 783.
(6) [1898] 2 Ch. 280.
(7) (1839) 5 M. & W. 279.
(8) [1905] A. C. 115, 118.
(9) [1927] W. N. 133; 43 Times L. R. 431.
(10) [1896] A. C. 44.

In the second appeal the application for an adjournment of the case ought to have been allowed in view of the publicity which had been given to the statement that the papers in the first action were being sent to the Public Prosecutor.

Birkett K.C., *Roland Oliver K.C.* and *E. G. Kimber* for the respondents. There was one issue and one issue only for the jury—namely, the character of the appellant—and the cross-examination to which objection has been taken was clearly admissible as cross-examination to credit. It is said that *Scott* v. *Sampson* (1) shows that it was not admissible to mitigate the damages; but the rule in that case has no application where, as here, the character of the appellant was put in issue from the start by his statement that he was a man of unblemished character save for one lapse. In *Scott* v. *Sampson* (1) the plaintiff did not go into the witness box and say that he was a man of good character. It is also said that the answers given by the appellant in cross-examination were binding on the respondents. That contention is clearly untenable.

[SCRUTTON L.J. Should not the jury have been directed as to the use they were entitled to make of the answers given in cross-examination?]

No direction was necessary in view of the jury's own intervention; but if a direction was necessary it was supplied by the speech of the appellant's counsel.

[SCRUTTON L.J. In *Bray* v. *Ford* (2), Lord Herschell said that the jury had returned their verdict on what they were erroneously led to think was the case, and not on the real case which the defendant was entitled to have submitted to them.]

The decision in that case turned upon this, that there had been a material misdirection. This action was brought to compensate the appellant for loss of reputation. That was clearly before the jury, who themselves intervened; so that no direction was necessary. Nor was it necessary to leave the meaning of the innuendo to the jury: Gatley on Libel and Slander, 2nd ed., p. 522, and cases there cited.

(1) (1882) 8 Q. B. D. 491. (2) [1896] A. C. 44, 53.

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Complaint is made that the communications by the jury were not disclosed to the appellant's counsel. It is a matter entirely within the discretion of the judge at the trial whether he will or will not show communications from the jury to the parties. Here no injustice was done by the non-disclosure of those communications.

[They referred to *De Freville* v. *Dill* (1); *Campbell* v. *Hackney Furnishing Co.* (2); *Goby* v. *Wetherill* (3); and *Rex* v. *Wood.* (4)]

With regard to the second case it was a matter entirely for the exercise of the judge's discretion whether he would or would not grant an adjournment; and it has been laid down that the Court of Appeal will interfere only in very exceptional circumstances: *Sackville - West* v. *Attorney-General* (5); *Maxwell* v. *Keun.* (6)

Serjeant Sullivan K.C. in reply cited *Ural Caspian Oil Corporation* v. *Hume-Schweder.* (7)

Cur. adv. vult.

March 13. The following judgments were read:—

SCRUTTON L.J. In this case I have come with regret to the conclusion that the Court should order a new trial. My regret is occasioned by the consideration that it is quite possible that a jury properly directed on relevant evidence may arrive at the same conclusion, as that at which the jury arrived in this case, and the Court will not be able, even if it desired, to disturb their verdict. But in my opinion the plaintiff is entitled to complain that he had not a satisfactory trial in two respects. First, that evidence of particular acts and incidents was admitted in cross-examination in mitigation of damages. Second, and independently of the first ground, that the jury had no proper summing-up and direction as to the question they had to consider, especially as to the failure of the defendants to justify their defamatory statements and the effect of the cross-examination to credit.

(1) [1927] W. N. 133; 43 Times L. R. 431.
(2) (1906) 22 Times L. R. 318.
(3) [1915] 2 K. B. 674.
(4) [1928] 1 K. B. 302.
(5) (1910) 128 L. T. Journ. 265.
(6) [1928] 1 K. B. 645.
(7) (1913) Times, July 31, 1913.

The worst of criminals is entitled to a fair hearing according to rules of law. I am not expressing any opinion whether Hobbs will ultimately be proved, as the defendants contend, though they do not assert their libel to be true, to be of the character I have referred to; but he is entitled to be presumed innocent until he is found by a trial according to rules of law to be guilty; and I regret to say I do not think he got such a trial. Mr. Hobbs is entitled to justice, and I hope he will get it.

William Cooper Hobbs, on March 9, 1925, was found guilty of a very disgraceful conspiracy to defraud in connection with a successful attempt to blackmail an Indian Prince visiting Europe, very imperfectly disguised at the trial under the pseudonym of "Mr. A." On March 10, the day after the conviction, there appeared in a number of newspapers, articles purporting to give the previous life history of Hobbs, articles of a most defamatory nature, containing a series of allegations of crimes and misconduct not connected with the offence for which Hobbs had just been convicted. On coming out of prison at the end of 1926, Hobbs commenced a number of actions for libel against these papers, some twenty in all. Some of the papers justified and afterwards settled; others did not justify, but paid a very small sum into Court; others settled the action for sums not specified. We were told that in no case settled out of Court had Hobbs obtained an apology or withdrawal of charges. The present action of *Hobbs* v. *Tinling & Co.*, the proprietors of the Liverpool Evening Express, was the first action which came into Court. The libel complained of contained more than a dozen allegations of criminal or dishonest or disreputable conduct not connected with the "Mr. A." case. He was said: (1.) to have financed burglaries; (2.) to have instituted a passport office for criminals; (3.) to have become a receiver of stolen property; (4.) to have been dismissed for dishonesty by a firm in Smithfield Market; (5.) to have for long been associated with one of the worst race gangs; (6.) to have run a gambling den in Paris, where a named person was "fleeced" of 46,000*l.*, and so on. The statement of claim set out the libel in its second paragraph, and its third paragraph alleged an innuendo

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which practically repeated the statements in the libel, but began with a general statement "that the plaintiff had practised dishonest methods all his life," and ended with a statement "that he had been all his life a notorious criminal." The defence was remarkable; it did not allege that any of the defamatory statements in the libel were true; there was no plea of justification or fair comment. But in respect of para. 2, setting out the words of the libel, the defendants paid 20*s*. into Court as sufficient damages. They made no payment into Court in respect of the innuendo in para. 3, as to which they denied "that the words were capable of bearing the alleged meanings or any of them." As the greater part of the innuendo was merely repeating the words of the libel it was difficult to understand why this form of plea was adopted, or how any jury properly directed could have avoided finding that the words would reasonably be understood to have the meanings alleged in the innuendo. Junior counsel for the defendants informed us that he pleaded in this form to avoid a motion for judgment. It appeared that the real line of defence was "It is true we have made a number of defamatory statements about you, none of which we can prove, and which must be taken to be untrue, but we are going to prove that your character is so bad that our defamatory lies can cause you no damage, and you have no remedy against us." It is in my opinion much to be regretted if this view is to be readily acceded to, and if persons, whether newspaper proprietors or private persons (and newspapers except in one or two limited respects have no greater rights than private persons), can recklessly publish untrue and defamatory statements about persons, and then shelter themselves under the plea "your character is so bad that we may make any untrue statement we like about you, with impunity." In my opinion any jury to whom such a plea is addressed should receive the most careful direction from the judge pointing out to them the effect of the course they are asked to adopt.

The issues on the pleadings as they stood were: (1.) What damages has the plaintiff sustained by the publication of the

words alleged in para. 2, with the dependent question, of which the jury were properly not told: "Is the sum paid into Court sufficient to cover these damages?" (2.) Would the words be understood by reasonable people to have the meanings alleged in the innuendo? (3.) If yes, what damages? there being no payment into Court in respect of the innuendo. These being the pleadings, the plaintiff was called upon to make an affidavit of documents, which in my opinion was properly a very short one. There was no justification of the libel, and he could not be called upon to include every document which might conceivably be the subject of a plea of mitigation in damages limited by the rule in *Scott* v. *Sampson* (1), to which I refer later, still less every document which might be material to every incident in his life on which he might be cross-examined as to credibility. The defendants then filed a notice in mitigation of damages under Order XXXVI., r. 37. The first paragraph of this plea appears to be a statement of the conviction in the "Mr. A." case which was alleged in the libel, and which oddly enough the defendants had not justified. The second paragraph states certain dates as to the business connected with the name of Appleton & Co. carried on by Hobbs in connection with various solicitors. If there was anything defamatory in the mention of Appleton & Co. in the libel the defendants had not justified it, and could not use particulars in mitigation to justify it. How these dates were admissible in mitigation of damages in view of the rulings in *Scott* v. *Sampson* (1) I do not understand. There then followed six long paragraphs setting out the details of the evidence given in the "Mr. A." case, which I understood were said to be evidence justifying the conviction, and also evidence of the circumstances under which the libel making untrue defamatory statements about entirely different matters was published; and lastly there was the allegation, in my opinion the only allegation properly included in the particulars, which is para. 10. Para. 10 is: "That the plaintiff is a man of worthless reputation and character, being known to the police, and in the profession of the law

(1) 8 Q. B. D. 491.

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as such." Para. 9 may possibly have some relevance, though I doubt it. It reads: "That immediately following the result of the plaintiff's trial there was published in a great number of newspapers and journals throughout the country articles purporting to give the story of the life of the plaintiff similar to that complained of by the plaintiff in this action, and the defendants had no reason to believe that the said articles were untrue." That appears to be a statement of rumours which has been excluded by *Scott* v. *Sampson* (1) as inadmissible.

The case then went to trial. The plaintiff's counsel might have abstained from putting the plaintiff in the box, risking the taunt that the plaintiff dare not face a British jury, and either relying on the presumption that the plaintiff was of good character, or calling evidence, if he could, of the good general reputation of the plaintiff. He might admit the plaintiff's conviction and that he had been punished for it, but urge that this did not entitle the defendants to tell other defamatory lies about him. He might have put the plaintiff in the box for cross-examination, relying, in order to limit the cross-examination, on the rule in *Scott* v. *Sampson* (1), and the decision in *Bracegirdle* v. *Bailey* (2), that if the plaintiff said nothing you could not cross-examine him to credit, for there was nothing to credit or discredit. This might have put the defendants in a difficulty, though, of course, I am expressing no final opinion in the matter. Plaintiff's counsel took a third course: after stating the effect of the pleadings and of the denial of the innuendo, he said: "It is necessary that I should state to you the true story of the plaintiff's life and especially point out to you what is the truth of the several matters alluded to in this publication." As the "several matters" were not justified and must be taken to be untrue, I am not clear that plaintiff's counsel was entitled on the pleadings to give evidence of specific facts from which good character or reputation might be inferred, as distinguished from evidence of general good reputation. However he did so without objection. The sort

(1) 8 Q. B. D. 491. (2) 1 F. & F. 536.

of statements made may be illustrated by the fact that whereas the libel stated that Hobbs was employed in Smithfield Market and dismissed for dishonesty there, counsel stated and proved that Hobbs never was employed at the market at all, was never dismissed for dishonesty there, and that, on the contrary, his named employers made him presents on his leaving them. I will deal later with the effect of such an opening and evidence on the conduct of the case.

In the course of the opening, counsel referred to Hobbs' connection with a Mr. Appleton, a solicitor, who died in 1917. The libel said that Hobbs, who was not a solicitor, persuaded Appleton, who was a solicitor, to enter into partnership with him. It said nothing more about Appleton. Whatever defamatory meaning the words of the libel might reasonably bear were not justified by the defendants. The particulars of mitigation of damage said nothing more than that from 1896 to 1917 Hobbs was associated with C. F. Appleton a qualified solicitor in the business profession and practice of a solicitor. Plaintiff's counsel said that Hobbs was not working for Appleton from 1910 to 1915, and that he went back to Appleton's service in 1915 on the terms of a letter from Appleton which he read. On this, defendants' counsel with the remark "I do not want to make complaint," said the letter was not disclosed, might he have a copy and a copy of any other documents plaintiff's counsel proposed to use. The Lord Chief Justice said: "That seems reasonable." Plaintiff's counsel said: "Decidedly," and the matter apparently dropped. Plaintiff's counsel in one sentence said that when Appleton became ill in 1916, he gave Hobbs a power of attorney dated September 8, 1916, and that when he died in 1917 he left by his will to Hobbs half the proceeds of the sale of his business and of his bank balance. No comment was made at the time about the absence of the power of attorney or will from the affidavit of documents. In fact the solicitor for the defendants, acting for another newspaper in another Hobbs action where justification was pleaded, had had the power of attorney disclosed to him, and he was in close

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touch with the widow of Mr. Appleton and with the independent solicitor who had advised her at the time of Appleton's death. There was no possible practical grievance to be made out of the absence of the power of attorney from the affidavit of documents. But Mr. Birkett, who was erroneously instructed, as he afterwards admitted, that the power of attorney which he said was of the utmost importance had never been disclosed, submitted that it, and other documents, had been intentionally omitted in order to keep the defendants in the dark. The Lord Chief Justice then said, on p. 24 of the Notes, to Mr. Birkett: "You submit that the omission here made by the person who made it was intentional? (Mr. Norman Birkett:) I do, my Lord. (The Lord Chief Justice:) What do you ask me to do, Mr. Norman Birkett? (Mr. Norman Birkett:) Of course, I must consider public time, and I must consider the money which a case of this kind necessarily involves. I should have asked, in the ordinary course, for an adjournment. (The Lord Chief Justice:) If you ask me for an adjournment you shall have an adjournment. (Mr. Norman Birkett:) I do not, my Lord. I prefaced it by saying that those considerations are in my mind. I submit that your Lordship should direct that all the documents which are to be referred to in this case, the power of attorney which is of the utmost importance in 1916 before the death of Mr. Appleton, and the marriage settlement, to which reference has been made, and a most partial view of it given by my learned friend, should be supplied. (The Lord Chief Justice:) Most certainly. This is elementary. These documents ought to have been in the affidavit of documents, and nobody knows that better than your client, Serjeant Sullivan. I shall deal with the matter at the conclusion of the case, but in the meantime let me say two things very clearly. If any document is sought to be used in this case, the original or a copy of it must have previously been supplied to the other side. Secondly, I shall not allow any document to be used in this case which has not been so dealt with." This was a most unfortunate proceeding; the Lord Chief Justice's view that the supposed non-disclosure of the document was contrary to elementary rules, and that

Hobbs must have known it, was arrived at and stated without calling on plaintiff's counsel to hear what he had to say. Plaintiff's counsel then complained that he had not been called on, and argued that there was no need to put the power of attorney in the affidavit of documents, and it was idle to talk about wilful suppression when the defendants' solicitor already had the document. This Mr. Birkett again denied, on erroneous instructions, and the Lord Chief Justice said very shortly that the suggested answer was no answer at all, and that he would deal later with the question of the affidavit. This was just before the midday adjournment; after the adjournment the solicitor for the defendants found he was mistaken, the document had been disclosed on a plea of justification in the other action in which he was solicitor, and Mr. Birkett, of course, at once informed the judge of his error. But neither counsel nor judge withdrew the accusation of wilful suppression. That it should have been originally made without hearing plaintiff's counsel was not very satisfactory, but in my opinion the Lord Chief Justice was quite mistaken in thinking that the document ought to have been inserted in the affidavit. It appeared from Mr. Birkett's subsequent cross-examination that the relevance of the power of attorney was this. He cross-examined for some hours on an incident to be referred to hereafter connected with a cheque for 256*l.* purporting to be drawn and initialled by Appleton just before his death in 1917, and cashed by Hobbs the day after Appleton's death. This incident was neither in the libel nor the particulars in mitigation of damages, but was justified by Mr. Birkett as cross-examination to credit. I cannot think that the Lord Chief Justice really appreciated that he was ruling that every document must be included in an affidavit which was relevant to any event in a plaintiff's life on which defendant might cross-examine to credit, although the plaintiff had no previous notice of the intention so to cross-examine. If he did, I can only entirely disagree with the ruling. Yet the evidence unfortunately started with what is, in my opinion, an erroneous accusation against the plaintiff of suppression, wilful or otherwise, of a document

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which the defendants already had, and which was not relevant to any direct issue in the action.

The plaintiff gave evidence substantially on the lines of his counsel's opening, concluding with a statement which I understand is not disputed, that except in the "Mr. A." case there had been no criminal charge (that is a charge in criminal proceedings) made against him in his life.

After a cross-examination as to his associates, defendants' counsel approached specific matters he proposed to ask about, and an objection was taken to ascertain the purposes and limits of such cross-examination. It began on p. 33 of the transcript with an objection to a question about the "Mr. A." case, but was soon extended by Mr. Birkett (see p. 36) as "manifestly important to questions which I am about to put," and he argued that as the plaintiff had put his good character in issue by affirmative evidence, defendants' counsel was entitled to cross-examine to credit on specific incidents for the purpose of negativing that good reputation, to mitigate damages, and to show the circumstances under which the libel was published. The only rulings the Lord Chief Justice gave were in these words: "Of course it is not admissible" (to justify any part of the libel); "it is cross-examination as to damages. Mr. Norman Birkett is engaged in showing, if he can, that this person is a worthless character," rather unfortunate language to use so early in the case about a man who is to be presumed innocent till he is proved guilty. Mr. Norman Birkett said: "The law as to mitigation of damages, I submit, is settled." The Lord Chief Justice said: "The law is perfectly well settled, and I have no doubt about that. I shall not disallow the question"; and the case proceeded on the footing that the plaintiff might be cross-examined on specific instances and conduct not mentioned in the libel or particulars in order to mitigate damages. I think this ruling was wrong. The civil wrong of defamation by a published written or printed statement, commonly known as libel, is committed by any one who publishes such a statement expressed in such a way that it would be understood by reasonable people to injure

appreciably the reputation of another amongst reasonable people acquainted with him. A plaintiff may recover general damages for such a statement without proving his actual reputation or any actual damage: *Tripp* v. *Thomas*. (1) It follows that a defendant may reduce the damages for libel by proving that the plaintiff had already a bad reputation. To do this the jury must take the view that his reputation is so bad that the defamatory statement complained of would reasonably and ordinarily cause much less damage than would be caused to a man of good reputation by the same statement. They may conceivably take the view that his reputation was so bad before the defamatory statement was published that no further defamatory allegation could make it worse. But they would have to consider, before taking such a view, the undoubted fact that the worse a man's character is the more ready are people to believe such reports about him, and to face the question whether it is lawful or desirable that because a man's character is bad any one should be at liberty to make any defamatory statements they liked about him, regardless of their untruth. I am not aware of, and counsel was unable to refer me to, any reported case where it was held that, in the case of any prima facie defamatory statement, proof that the plaintiff had a bad reputation which could not be made worse was an answer to the action. It is, I think, generally assumed that the plaintiff proving a statement prima facie defamatory and unexcused by justification, privilege, or fair comment, is always entitled to nominal damages.

Questions have, of course, arisen as to the circumstances under which evidence can be given to mitigate damages, and the judgment of Cave J., concurred in by Mathew J., in *Scott* v. *Sampson* (2), which carefully considered the authorities, has, I think, been accepted as an accurate statement of the law. The defendant may mitigate damages by giving evidence to prove that the plaintiff is a man of bad general reputation, and the plaintiff may rebut it by "coming prepared with friends who have known him to

(1) (1824) 3 B. & C. 427. (2) 8 Q. B. D. 491.

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prove that his reputation has been good." On the other hand, the defendant may not give evidence of rumours at the time of publication to the same effect as the libel, nor may the defendant give evidence of specific facts and circumstances to show the disposition of the plaintiff, as distinct from general evidence that he has that reputation. If those specific facts are to the same effect as the libel, which he has not justified, he cannot justify under the plea of mitigation of damages. If those facts are different from the libel they do not prove actual reputation, which can be proved under the first head, but that he ought not to have such a reputation. Cave J. says of the evidence that it would throw upon the plaintiff the difficulty of showing an uniform propriety of conduct during his whole life. It would give rise to interminable issues which would have but a very remote bearing on the question in dispute, which is to what extent the reputation which he actually possesses has been damaged by the defamatory matter complained of. Lord Abinger said in *Speck* v. *Phillips* (1): "It is a principle as old as my recollection of Westminster Hall, that matter of justification cannot be given in evidence in an action, in order to mitigate the damages." Lord Halsbury repeated it in *Watt* v. *Watt* (2): "Even in mitigation of damages it is well settled you cannot go into evidence which, if proved, would constitute a justification. Nor does it appear to me that it makes any difference that the evidence is offered in cross-examination."

In my opinion, just as you cannot prove in chief specific instances of misconduct, as distinguished from general reputation, whether involved in the libel or not, in order to mitigate damages, so also you cannot achieve that purpose by cross-examination as to such specific instances.

There is, however, another purpose for which cross-examination as to specific instances not involved in the libel can be used. When a witness has given evidence material to the issues in the case you can cross-examine him on matters not directly material to the case in order to ask the

(1) 5 M. & W. 279, 281. (2) [1905] A. C. 115, 118.

jury to infer from his answers that he is not worthy of belief, not a credible person, and therefore that they should not accept his answers on questions material to the case as true. This is cross-examination as to his credibility, commonly called cross-examination to credit. But as it is on matters not directly material to the case, the party cross-examining is not allowed to call evidence in chief to contradict his answers. To permit this would involve the Court in an interminable series of controversies not directly material to the case on alleged facts of which the witness had no notice when he came into Court, and which he or the party calling him might not be prepared without notice to meet. This rule, which has been established by cases in which the party cross-examining has desired to call rebutting evidence in chief, has been expressed in various ways. Taylor on Evidence uses the phrases "cannot be contradicted by independent evidence"; "must be taken as conclusive." In *Harris* v. *Tippett* (1) that great judge, Lawrence J., used the phrases "You must take his answer"; "You cannot call other witnesses to contradict the answers he gives." Alderson B. in *Attorney-General* v. *Hitchcock* (2), says: "Public convenience requires that [the answer] be taken as decisive, and that no contradiction be allowed." But this does not go to the extent contended for by the appellant's counsel that the jury must believe the answers given by the witness. No case has been found where such a contention has been put forward, and if the jury, hearing the answers given by the witness, do not believe him they are entitled to do so, and to use the view thus obtained as to his credibility in rejecting answers given by him on matters material to the case. But rejecting his denials does not prove the fact he denies, of which there is, and can be, no other evidence. It only destroys his credibility in respect of other evidence. This is illustrated by the nisi prius case of *Bracegirdle* v. *Bailey* (3) tried at Liverpool before Byles J. The action was for a slander imputing specific forgeries.

(1) 2 Camp. 637. (2) 16 L. J. (Ex.) 259, 262; 1 Ex. 91, 104.
(3) 1 F. & F. 536.

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The plaintiff was put in the box for cross-examination, but gave no evidence in chief. Counsel for defendants proposed to ask him specific questions as to his past life. (Byles J.:) "These questions cannot be asked. Inasmuch as he has proved nothing you cannot cross-examine him to discredit him." (Counsel for defendant:) "Does your Lordship decide that I cannot cross-examine him generally in mitigation of damages?" Byles J. at first said: "There is no plea of justification, and you cannot ask any question which would go to the justification," but then went to consult Willes J., and, returning, held "that no evidence of bad character, or questions relating to the plaintiff's previous life or habits, tending to discredit him, and to mitigate damages, were admissible, either on cross-examination or examination in chief, and that he could not ask anything to prove the libel true." So far as this excludes questions as to general bad character in mitigation of damages, it is contrary to *Scott* v. *Sampson* (1), and would not now be followed. But so far as it excludes evidence of, or questions in cross-examination as to, specific acts irrelevant to the libel to mitigate damages, it is in accordance with *Scott* v. *Sampson* (1), and in my opinion correct. The exclusion of questions tending to discredit him is based on the fact peculiar to the case that he had given no evidence to be discredited, but where such questions were admissible their effect would be limited to discrediting his answers, and would not extend to proving the facts he was questioned about for the purpose of mitigating damages. If this statement of the law is correct, as in my opinion it is, it follows that when the Lord Chief Justice ruled that though cross-examination to justify any part of the libel was not admissible, cross-examination as to particular facts to mitigate damages was, and Mr. Birkett followed it up, having said that "The objection would arise upon questions he was about to put"—by a question on p. 42—"Would a man who was a forger, and deliberately robbed the widow of his best friend, be entitled to any damages at the hands of a British jury?" and then followed this up by a long

(1) 8 Q. B. D. 491.

cross-examination suggesting that eleven years before Hobbs had forged a cheque for 256*l.*, or had robbed Mrs. Appleton of 250*l.*, neither of which matters was mentioned in the libel, or the particulars in mitigation of damages, the Lord Chief Justice was allowing answers in cross-examination to be used for a purpose, mitigation of damages, for which they could not legitimately be used, and evidence of such matters was being used for a purpose for which it was not available.

It was argued that when counsel for the plaintiff opened and called evidence as to his client's actual life, as distinguished from the version put forward in the libel, he let loose cross-examination as to every fact of his past life. I think he did entitle the defendants to endeavour to destroy his evidence by cross-examination to credit to show that his evidence should not be accepted because he was not a credible witness, but I do not think (1.) that it entitled the defendants to justify when they had not pleaded justification, nor do I think (2.) that it entitled the defendants to cross-examine as to other specific facts in the plaintiff's life to mitigate damages, contrary to the ruling in *Scott* v. *Sampson.* (1) The defendants would, however, be entitled to cross-examine on such facts to prove that the witness was not a credible person, and to employ that proof of unreliability to the evidence he had given in chief. But by destroying that evidence you do not prove its opposite. If by cross-examination to credit you prove that a man's oath cannot be relied on, and he has sworn he did not go to Rome on May 1, you do not, therefore, prove that he did go to Rome on May 1; there is simply no evidence on the subject.

After this ruling there followed a day's cross-examination on two incidents, one of which had occurred eleven years before the trial, and another twenty-three years before the trial. Neither of them was in the libel, or in the particulars in mitigation. As they may be referred to in the new trial we are ordering I propose to say very little about them, except

(1) 8 Q. B. D. 491.

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that the fact that Hobbs denied most of the suggestions of the cross-examining counsel rendered it essential that the presiding judge should carefully explain to the jury what evidence there was, apart from the suggestions, and for what purpose that evidence was to be used.

The first incident relates to a sum of 250*l.* which Hobbs obtained from Appleton's bank the morning after Appleton's death. Counsel suggested, and Hobbs denied, that he knew of the death when he cashed the cheque. The cheque appeared to have been signed by Appleton in blank. Hobbs' authority to use it to obtain the 250*l.* was contained in two documents purporting to be signed by Appleton. I think it was suggested these were forgeries, but so many crimes were suggested as to this incident that I am not sure. The cheque signed by Appleton was altered by Hobbs from "Order" to "Bearer" by initials "C. F. A." written by Hobbs. Hobbs said that he was authorized to do this by a power of attorney produced; I think again it was suggested that this was a forgery. Hobbs said that he was to pay, and did pay, the 250*l.* to the account of one Percival at a named bank. Counsel suggested that Percival was a well known steamship gambler; Hobbs denied any knowledge of this. Whether Hobbs was entitled to have received this 250*l.* was in 1917–18 investigated by an independent solicitor, by no means friendly to Hobbs, on behalf of the widow, and he allowed the item in account. It is clear that in any proceeding where it was material this transaction would require close investigation. But it seems very unsatisfactory that the jury should be invited to find that Hobbs had committed one or more crimes not the subject of the libel, without any precise notice by indictment or otherwise of what crimes he was accused of, without any evidence first presented for the prosecution with the restraint with which English criminal prosecutions are conducted, and without the careful explanation to the jury of the evidence, and the issues, and the purpose for which they might be used, which any English judge would give to the jury if he were trying a prisoner for a specified crime.

The other matter, also not in the libel or particulars, was an incident said to be one of several, which had occurred in 1905, and had been dealt with by Farwell J. It concerned a county court case in which Appleton's firm, acting for a man called Long, had settled with the defendants to that action for 45*l.* and 25 guineas costs, but had only paid 35*l.* to Long, alleging that Long had authorized them to settle for 35*l.* to himself, and the 10*l.* was extra costs. A clerk called Fraser had claimed 2*l.* extra from Long; it was not suggested this had gone to Hobbs. Long's and Hobbs' affidavits were read to the jury, Hobbs contradicting many of Long's statements. It was suggested that Farwell J. had condemned the system of Appleton's clerks, including Hobbs, but no report of his judgment was produced. I do not think Long's affidavit was evidence against Hobbs in these proceedings; it might be, on the authority of well known criminal cases, if Hobbs dealt with it in a way to constitute an admission, but Hobbs had contradicted many of the statements in it. Again in my opinion the jury should have been directed as to what evidence was available for them, and for what purpose they could use their finding.

The cross-examination occupied the second day, and was unfinished at its close. We now know, though counsel did not know it for some time after, that on the second day the jury made what the Lord Chief Justice calls a "tentative intimation," and followed it on the third morning by a communication that "they are unanimously agreed they have heard sufficient evidence in the case." The first communication was never shown to counsel, and we do not know what the terms of the "tentative intimation" were, or what answer, if any, the Lord Chief Justice made. It may be that it was not made till the close of the second day at the rising of the Court. The second communication was never shown to counsel, though, as the Lord Chief Justice twice uses the same words, he was probably reading all, or part, of it. But counsel for the plaintiff was required to answer whether he was going to call other evidence without being told that the jury had made any communication to the judge.

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I am clearly of opinion that this procedure was not in accordance with the usual practice of judges, and was very unsatisfactory. It is clear that neither a High Court, nor any subordinate, judge can discuss matters in private with the jury, or can, in answer to their private question, give them a direction in law or fact which is not communicated to the parties. Trials must be in public, in that the parties hear all that goes on, except the consultation of the jury amongst themselves. No one must communicate with the jury except to ask them, by direction of the judge, whether they have agreed, or are likely to agree, on their verdict: see *Rex* v. *Wood* (1); *Goby* v. *Wetherill*. (2) In the same way, any communication from the jury to the judge should be communicated to the parties. An apparent exception is when the jury ask for extra remuneration, and the judge, as he frequently and wisely does, takes upon himself the responsibility of saying the request cannot be complied with; but even then it is better that the parties should know of the request, though they need not be made to bear the odium of refusing it. When a jury, as sometimes happens, informs the judge, before the plaintiff's case has finished, that they desire to find for the defendant, or that they desire to find for the plaintiff, before they have heard the defendant, the judge can take two courses. (1.) He may, if he thinks this premature intervention renders it impossible for the trial to proceed with justice, discharge the jury and order a retrial: see *De Freville* v. *Dill*. (3) (2.) If he thinks justice can still be done, he may inquire of the party whose case has not been completed if he desires to complete it, and that party has the right to complete his case, to re-examine any witness under cross-examination, to call any other evidence he desires, and to address the jury, if he desires. The plaintiff's counsel, if his opponent has put in evidence, will, of course, address the jury last; otherwise his opponent, who has put in no evidence, will have the last word. The judge is, in my opinion, bound to sum up to the jury sufficiently to

(1) [1928] 1 K. B. 302.
(2) [1915] 2 K. B. 674.
(3) [1927] W. N. 133; 43 Times L. R. 431.

make clear what are the issues they have to decide, and especially where the evidence largely consists of answers and complete or partial denials to the assertions of cross-examining counsel in the form of questions. If the jury, after hearing counsel, say that they are still of the same opinion, this does not relieve the judge of the duty of so directing them that they understand what issues they are to decide and on what evidence. This position is illustrated by the decision of the House of Lords in *Ural Caspian Oil Corporation* v. *Hume-Schweder* (1), reversing the decision of the Court of Appeal. Mr. Hume-Schweder, who was a director, sued his company for commission for placing shares of the company. There was an article that a director might, for special services, have special remuneration. The jury, during the plaintiff's case, said they thought the plaintiff was entitled to remuneration for introducing a purchaser; the defendant elected, and the judge allowed, the case to continue. What then happened, as stated in the judgment of Lord Loreburn, was: "The learned judge did not warn the jury that the defendants were entitled to have their evidence heard, but the case was adjourned for the defendants to consider what they would do. Nor did the learned judge point out to the jury that proof of an introduction was by no means sufficient to establish the plaintiff's case. . . . . If, after the evidence was complete, the learned judge had explained the issues to the jury, and upon that they had still found for the plaintiff, the verdict might have been sustained, notwithstanding their unfortunate intervention. But after the defendants' case was closed, he merely told them that they had already expressed an opinion about the case, and that if they had any doubts in their mind, altering that matter, he would deal with it, but that if they remained of the same opinion, he did not see any good in wasting time by further discussion. Thereupon the jury found for the plaintiff. I cannot think that such a verdict ought to stand." Lord Shaw, Lord Parker and Lord Halsbury concurred.

(1) Times, July 31, 1913.

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The proper procedure being as above, in the present case what happened was as follows: At the beginning of the third day the Lord Chief Justice asked the plaintiff's counsel two questions: "Serjeant Sullivan, may I ask you is it your intention to offer evidence for the plaintiff other than the evidence of the plaintiff himself? (Serjeant Sullivan:) That, when the cross-examination is finished, I will consider. (The Lord Chief Justice:) I ask you to consider it now, if you please. (Serjeant Sullivan:) So far, I did not intend, as the matter stands now." The plaintiff's counsel was entitled to postpone his answer till he had re-examined, and in any event had not been informed, as he should have been, of the message from the jury. The Lord Chief Justice then continued: "Now I have received an intimation from the members of the jury in which they say that they are unanimously agreed that they have heard sufficient evidence in this case. (*To the jury.*) Members of the jury, do you mean by that intimation that upon the plaintiff's own evidence you desire, if you can, to find a verdict for the defendants? (The Foreman of the jury:) Yes, my Lord, that is our opinion. (The Lord Chief Justice:) And may I take it that as a consequence if, as a matter of law, upon these pleadings, it is necessary that there should be a verdict for the plaintiff for some amount, your verdict would be for the smallest possible amount? (The Foreman:) Yes, my Lord." Here the Lord Chief Justice, without having informed the jury that the plaintiff's case was not finished, or directed them as to the issues they had to decide on the evidence, was suggesting to them what their answers meant. The plaintiff's counsel then said: "Before that result is arrived at, my Lord, I would insist upon addressing the jury." It is obvious and elementary that he had such a right, if he thought it worth while to claim it, whether against a jury who have said, before the end of the plaintiff's case, they had heard sufficient evidence, or a judge who showed any signs of disputing the right. However, the word "insist," or perhaps the tone in which it was said, seems to have annoyed the Lord Chief Justice, who objected to the word.

He then asked the plaintiff's counsel to argue what I should have thought was an obvious proposition. "I will hear you upon that point, Serjeant Sullivan. Are you entitled to address the jury when the jury have said upon the evidence of the plaintiff himself they are satisfied that he ought not to recover ? " and the Lord Chief Justice called upon Mr. Birkett, who very prudently declined to oppose the application and left it to the judge. The Lord Chief Justice then asked Mr. Birkett if he wished to continue the cross-examination. He said he did not, but in a moment of forgetfulness said he reserved the right to address the jury last. Mr. Birkett must have forgotten that he had put in evidence, which, of course, deprived him of the right to speak last. However, the Lord Chief Justice, also in a moment of forgetfulness, agreed with Mr. Birkett, and said "Quite." The plaintiff's counsel then said he had a right to re-examine the plaintiff —as he obviously had. This point seemed not to have occurred to the Lord Chief Justice, but counsel did not insist on it, and proceeded to address the jury.

Before us, Mr. Birkett seriously argued that this address of the plaintiff's counsel took the place of, and supplied the necessity for, a summing-up by the judge. Considering that both the Lord Chief Justice and Mr. Birkett, during the speech, protested against its inaccuracy, the Lord Chief Justice saying at one point, in answer to a complaint of Mr. Birkett, that some proposition was not correct, "Most incorrect, but really, Mr. Birkett, I think it is better to let the matter go on," without directing the jury what was the correct proposition of law in the matter, I think it is impossible to treat this argument seriously. At the end of the speech, Mr. Birkett said he did not propose to address the jury (and indeed he had no right to), but raised the question of the innuendo. As he had expressly limited his payment into Court to the words without the innuendo, he clearly saw difficulties ahead. The jury could not reasonably find that the words could not bear the meanings alleged, and he had not protected himself against a verdict of a farthing by payment into Court, which failure might prevent him from recovering the costs of

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that issue. He argued (1.) that there was no evidence to enable the jury to find that the words bore the meaning alleged. But the words, being plain English words, and having been read with the alleged innuendo to the jury, they were the judges, without further evidence, of whether the words would be reasonably understood to bear the meanings alleged. (2.) Mr. Birkett argued that he was entitled to the jury's verdict, on that part of the case; why, I do not understand.

The Lord Chief Justice dealt with the matter in this way, and what follows in my opinion shows the confusion into which the jury had got, and the absolute necessity for a careful explanation of the issues they had to try, and the evidence they had heard, as distinguished from the suggestions of counsel. The Lord Chief Justice said: "I propose to take a simpler course. Members of the jury, at half-past ten this morning, following upon a tentative intimation yesterday, you intimated to me, in terms, that you are unanimously agreed that you have heard sufficient evidence in this case. It is now nearly half-past eleven. Are you still of the same mind? (The Foreman of the jury:) Yes, my Lord. (The Lord Chief Justice:) And does that mean that you desire, if you may, to find for the defendants? (The Foreman:) We desire to find for the plaintiff. (The Lord Chief Justice:) You mean the defendants, do not you? (The Foreman:) That is what we want to know. (The Lord Chief Justice:) You know the plaintiff is the man who is bringing the action. (The Foreman:) Yes, I understand that. (The Lord Chief Justice:) The defendants are the persons who are meeting the action. You said to me an hour ago that you desired to find in favour of the defendants. Is that so? (The Foreman:) Yes, my Lord. (The Lord Chief Justice:) Further, you said that as a consequence, if upon these pleadings the plaintiff was entitled to some damages you would award the smallest possible sum, that is to say, a farthing? (The Foreman:) That is so. (The Lord Chief Justice:) Now will you confer with your colleagues of the jury and tell me if you are still all of the same mind? (*The jury conferred from* 11.27 *to* 11.31.) (The Foreman of the jury:) My Lord, we are willing to find

for the defendants, as far as the law permits it. (The Lord Chief Justice:) Very well, then you are still of the same mind? (The Foreman:) We are still of the same mind. (Mr. Norman Birkett:) My Lord, I ask for judgment for the defendants. (The Lord Chief Justice:) There must, of course, be judgment for the defendants, and in view of the fact that there was a payment into Court of a very small sum it is perfectly obvious that you are entitled to the costs from the date of the payment in. (Mr. Norman Birkett:) If your Lordship pleases. (The Lord Chief Justice:) But a further question arises, and it is an interesting question. The jury have expressed twice the very clear, and, if I may say so, the obviously proper opinion, that there ought to be a verdict in this case for the defendants if such a verdict is lawful on these pleadings. Now no doubt where you are dealing with printed words, as distinguished from spoken words, if the words are defamatory the law presumes that there is some damage. (Mr. Norman Birkett:) Yes, my Lord. (The Lord Chief Justice:) But may that presumption be rebutted? May a plaintiff appear obviously to be so worthless a person that it is impossible that he could suffer damage from any libel? (Mr. Norman Birkett:) I can most certainly conceive the possibility of such a plaintiff existing, but, my Lord, in view of the fact that I have paid into Court 20*s.*—19*s.* 11¾*d.* too much—even a verdict for the plaintiff, and judgment for the plaintiff for a farthing damages would, of course, from the practical point of view, be judgment for the defendants. (The Lord Chief Justice:) Yes. (Mr. Norman Birkett:) With regard to the point your Lordship raises, I am bound to say that I know of no case where a plaintiff who has recovered damages, and been entitled to damages, has failed to get a farthing." Then counsel refers to a case before McCardie J. Then the Lord Chief Justice said: "So far as I know, there is no case in the books. (Mr. Norman Birkett:) No, my Lord." Then the Lord Chief Justice referred to an unreported case and said: "However I gather that in this case you are asking for judgment for the defendants on the footing that the plaintiff has a verdict

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of a farthing. (Mr. Norman Birkett:) Yes, my Lord. (The Lord Chief Justice:) You are content with that? (Mr. Norman Birkett:) Yes, I am. (The Lord Chief Justice:) Very well, then judgment for the defendants with the usual consequences where there has been a payment into Court. (Mr. Norman Birkett:) Yes, my Lord. That covers the point I desire to make." So far the procedure is almost exactly that condemned by the House of Lords in the *Ural Caspian Corporation* case (1); no summing-up, but "Are you of the same opinion as when you first addressed me?" The Lord Chief Justice then suggested to Mr. Birkett whether there need be a verdict for a farthing, in nominal damages, and discussed the point with Mr. Birkett, ending on p. 200 by saying there must be judgment for the defendants, with the usual consequences when there has been a payment into Court. It will be noticed that again, as had been the case in the Lord Chief Justice's decision on the affidavit of documents, plaintiff's counsel was not called on to state his views on the matter. Serjeant Sullivan said so and that he had asked the judge to leave the matter of innuendo to the jury. The Lord Chief Justice said, as to the first matter, he had "looked at him three times," as to the second, Mr. Birkett said "that it was plain that the jury did find the matter which I expressly raised," and the Lord Chief Justice said "Yes, it was quite plain." I cannot understand what this means; what are the jury supposed to have found? That the words complained of would not be reasonably understood to have the meanings alleged? But that was an impossible finding. That the damages for the words with the innuendo were a farthing? But that would leave the question of costs to be considered, without a payment in to cover the innuendo.

I have, with great reluctance, come to the conclusion that the trial was so unsatisfactory that we must order a new trial. My reluctance arises from my feeling that if the case had proceeded to its end, and the jury had received a proper direction, it is very possible, even probable, that the jury might have arrived at the same result, and their verdict

(1) Times, July 31, 1913.

could not be interfered with. But again, I have the guidance of the views of the House of Lords on a similar question in the case of *Bray* v. *Ford*. (1) In that case the judge at the trial misdirected the jury as to part of a long libel. The jury had given 600*l*. damages, and the Court of Appeal took the view that such an amount might reasonably be given by the jury in respect of the part of the libel as to which no misdirection had occurred, and therefore declined to interfere. The House of Lords took a different view. Lord Halsbury said (2): "My Lords, I think there has been a substantial wrong and a miscarriage. I think there has been a substantial wrong, since I think the defendant was not permitted to present his case to the jury with the argument that his original complaint was true. This seems to me a substantial wrong, and I am not prepared to say what a jury might think if they were told that the original complaint was itself unfounded, or if they were told that, though this original complaint was well-founded, there was excess in the language by which that original complaint was made; but it appears to me that it was, in this case, withdrawing from the jury a question which the defendant had a right to have submitted —a right which was so relevant and important to the discussion that I must say I cannot regard it as trivial or immaterial matter; and I think it was a miscarriage as this view was not presented to the jury. What influence such a wrong might have had upon the verdict or upon the amount of damages I am not disposed to consider. The case must be tried again, and I desire to say nothing which can in any way influence the arguments upon the trial which must take place. It is nothing to the purpose to say that the rest of the printed matter complained of as a libel would justify a verdict to the same amount of damages. I absolutely decline to speculate what might have been the result if the judge had rightly directed the jury. It is enough for me that an important and serious topic has been practically withdrawn from the jury, and this is, I think, a substantial wrong to the defendant." Then Lord Herschell

(1) [1896] A. C. 44. (2) [1896] A. C. 47.

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said (1): "But in the case of an action for libel, not only have the parties a right to trial by jury, but the assessment of damages is peculiarly within the province of that tribunal. The damages cannot be measured by any standard known to the law; they must be determined by a consideration of all the circumstances of the case, viewed in the light of the law applicable to them. The latitude is very wide. It would often be impossible to say that the verdict was a wrong one, whether the damages were assessed at 500*l.* or 1000*l.* Where, then, the judge so directs the jury as to lead them to take an erroneous view of any material part of the alleged libel, and this view may have affected their minds in considering what damages they should award, I think there has been a substantial miscarriage within the meaning of the rule. The Court may think, as I might think in the case before your Lordships, that the jury would have given the same damages if the law had been correctly expounded; but this is a mere matter of speculation; it cannot be asserted with the least certainty that they would have done so. The jury have returned their verdict on what they were erroneously led to think was the case, and not on the real case which the defendant was entitled to have submitted to them. I find it impossible to say that the case upon which the jury ought to have adjudicated ever was wholly before them, and that they were allowed to give to all the circumstances which might legitimately have influenced the verdict their due weight. This seems to me to establish that there has been a substantial miscarriage, and that the appellant is entitled to a new trial." I act on this view. If the jury had received a direction explaining to them the position as to the libel complained of, and the purposes for which they might use the evidence they had been listening to for a day, I cannot say what verdict they would have returned. In my opinion the absence of such direction, combined with the other circumstances of the case, constituted a substantial miscarriage, entitling the plaintiff to a new trial. The grounds on which I think it right that a new trial should be granted are two: First,

(1) [1896] A. C. 52.

that the Lord Chief Justice gave a wrong direction when he ruled that specific acts of misconduct, not the subject of the libel, might be given in evidence, by questions in cross-examination in mitigation of damages. Secondly, and independently, that when the jury purported to decide against the plaintiff before his case was finished, they should have received a direction to listen to the re-examination, if any, and the speech of counsel for the plaintiff, and should then have been directed carefully as to the issues they had to try and the nature of the evidence they had listened to, especially its effect as cross-examination to credit, and the position when the defendants did not attempt to justify their libels. A good deal of the notice of appeal was taken up by complaints of interlocutory observations of the Lord Chief Justice, mostly unfavourable to the plaintiff. If these had stood by themselves, they would, in my opinion, have shown no ground for disturbing the verdict; and I regret that, with much better grounds available, it was thought right to insist on them. Though the jury and not the judge are the judges of fact, the judge is entitled to make such comments on fact as he thinks right, either during the trial, or in the summing-up, provided he makes clear to the jury that they are the judges of fact, and not the judge, and that his observations are only submitted for their consideration and guidance and may be disregarded if the jury do not agree with them. It was unfortunate that the evidence started with an erroneous censure of the plaintiff in the matter of the affidavit, but the substantial ground for thinking that the trial was unsatisfactory is the erroneous direction as to the use that might be made of the evidence of specific acts, not the subject of the libel, and the absence of any summing-up or explanation of the effect that might be given to the cross-examination, or to absence of justification.

The judgment for the defendants must be set aside and a new trial ordered. Following the usual practice of this Court, the plaintiff must have the costs of the appeal, and the costs of the first trial must abide the event of the second. As there may be some doubt as to what " the event " of the second

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trial is, in case of any difficulty, the matter must be left to the discretion of the judge who presides over the new trial.

There remains the interlocutory appeal against the refusal to adjourn the hearing of the following case, *Hobbs* v. *Nottingham Journal, Ld.*, an action relating to a very similar but not identical libel, published on the same day, where the defendants, appearing by the same solicitors and counsel, did not justify, but paid into Court in respect of the words, but not of the innuendo. The Lord Chief Justice originally proposed to proceed with the second action before the same jury, and the plaintiff's counsel objected. If this course had been pursued, and the plaintiff's counsel had challenged for cause, asking each juryman whether he had already formed an opinion about Hobbs, considerable difficulties would have arisen. There would also have been the difficulty that the jury knew of the payment into Court in the first action. Both the Lord Chief Justice and Mr. Birkett appreciated this, and as no other special jury was available, the case was adjourned till the following morning. But the Lord Chief Justice then said: "Very well; to-morrow morning at half-past ten. Mr. Birkett, as that adjournment has taken place, I must say now what otherwise I would have said at the end of the second case. These documents are impounded and will go to the Public Prosecutor." I do not understand what useful purpose was served by taking this course. The papers sent to the Public Prosecutor were (1.) the correspondence, cheque counterfoil and power of attorney, in the matter of the 250*l.*, which had taken place nearly twelve years before, which case at the time had been investigated by an independent solicitor, who acquiesced in the payment, and in which case Mr. Appleton, a most material witness, was dead. Whatever might be the result of a civil action, in which Hobbs was plaintiff, if there could be such an action, I think the most experienced prosecuting counsel would find the greatest difficulty in proving any criminal charge against Hobbs in this respect, or of reopening the settlement of 1918 in any civil action. The other papers sent were the affidavits in the proceedings in Chancery about Long, heard by

Farwell J. twenty-two years before; and I cannot understand why the Public Prosecutor should be asked in 1929 to consider a matter which a High Court judge had considered and dealt with in 1905, without finding it necessary to consult the Public Prosecutor. In my opinion the remission to the Public Prosecutor should be suspended while these actions are being reheard, the documents remaining in the custody of the Court for production at the second trial, and that it be referred to the judge at the second trial to consider, after reading these judgments, and the course of the second trial, whether it is necessary to consult the Public Prosecutor any further. In any event, I cannot understand why, if the Lord Chief Justice, as he says, would not have made his intimation about the Public Prosecutor till the end of the second case, if the cases had been heard before the same jury on the same day, he should make it before the second case was tried next day before a different jury. I should have thought the first jury might have suspected what was happening when the Lord Chief Justice, during the trial, was asking for the original letters; but Mr. Birkett tells us, and of course the Court accepts his statement, that he himself did not understand that the Lord Chief Justice was going to send the originals to the Public Prosecutor, and the jury may have been equally in the dark. But the result of the Lord Chief Justice's statement, made when it was, was that the evening London papers, and no doubt the morning papers too, gave the fullest publicity to "Hobbs' case. Judge sends papers to Public Prosecutor"—a fact which could not fail, in my opinion, to prejudice the hearing of the second case.

The next morning counsel for Hobbs moved for an adjournment of the second case, on the ground that they were appealing in the first case, and of the publicity given to the announcement about the Public Prosecutor. The application was refused; the second case was called on, counsel for the plaintiff did not appear, and judgment was entered for the defendants. In the opinion of this Court the first case was, as the plaintiff contends, unsatisfactorily tried. The judge who tried the first case would have tried the second case in

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the same way and on the same rulings, with the additional disadvantage of the prejudice resulting from his premature action with regard to the Public Prosecutor. I cannot see that it was the duty of the plaintiff's counsel to incur the expense of a second hearing, in order to obtain the same rulings, and have the same appeal. If they had failed in the first appeal, they would have paid the penalty of their non-appearance in the second action. But succeeding, as they do, in convincing the Court that the first case was not satisfactorily tried, they succeed in showing that the second and similar case should not have been tried before the same judge, with the same opposing counsel, and a jury who probably had heard of the action of the judge in sending papers to the Public Prosecutor. I do not say that a plaintiff who brings twenty-four actions for libel is entitled to twenty-four judges to try them. An English judge, according to the traditions of the English Bench, does his best to decide each case according to the evidence and arguments in it, regardless of any decision he may have given against one of the parties on other evidence and arguments. But there are cases where it is desirable that the feeling created by a first case should be allowed time to disappear, and the rulings in a first case have an opportunity of being affirmed or corrected before a second similar case is tried. In my opinion the present is such a case.

In the case of *Hobbs* v. *Nottingham Journal, Ld.*, the interlocutory appeal must be allowed; the judgment in favour of the defendants set aside. The plaintiff must have the costs of this appeal; the costs of the first trial and the interlocutory motion must abide the event of the second trial, with, as in the last case, power to the judge hearing the second trial to decide what shall be done if the event is uncertain.

GREER L.J. This is an application by the plaintiff for a new trial in an action for libel tried before the Lord Chief Justice and a special jury, which resulted in a verdict for the plaintiff for one farthing damages, and judgment for the defendants, 1*l.* having been paid into Court with an admission

of liability, the defendants to receive all costs after the date of payment in.

By his notice of appeal the plaintiff alleged various grounds of complaint with reference to the conduct of the trial by the Lord Chief Justice. Most of these complaints, in my judgment, are trivial, without substance, and such as afford no justification for asking for a new trial. It is impossible, however, to leave them out of account when dealing with the main question raised by the appeal, which is concerned with the premature expression of opinion by the jury before the plaintiff's case was concluded, and the way in which that matter was dealt with by the learned Lord Chief Justice, because they afford, in my view, an explanation of the way in which the Lord Chief Justice dealt with the case when it became necessary to decide what should be done when the jury so expressed their view. The plaintiff was a man who came into Court having to admit, at the outset, that he had been rightfully convicted of a serious criminal offence—namely, conspiracy to defraud Sir Hari Singh out of a large sum of money. His conduct in this matter had become notorious by reason of the public trial of a civil action, and by reason of his own public trial at the Central Criminal Court, and the verdict and conviction recorded against him, and it was obvious that the atmosphere in which the present action started was unfavourable to him. It was not unnatural that he should be regarded with suspicion, and naturally, though I think unfortunately, the Lord Chief Justice, in observations he made from time to time, and in questions he put to the plaintiff, exhibited an unfavourable view of him and his evidence. Before the plaintiff was put into the box the Lord Chief Justice made a mistake with reference to the plaintiff's affidavit of documents, and what he said in the presence of the jury must have left the impression that the plaintiff had dishonestly refrained from putting relevant documents into his affidavit of documents. The mistake was a natural one to make, inasmuch as the documents in question had all been referred to by the plaintiff's counsel in opening, and the explanation as to why they were not in

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the affidavit of documents was not too clear, the main point being that the defendants' solicitors had had these documents in another case. This, of course, afforded no real answer, if they were relevant documents, but when the issues in the action are properly appreciated it is quite clear that the documents were not relevant at the time the affidavit was made, and they only became relevant by being used in anticipation of cross-examination to credit. The other objections made to the observations and questions of the learned Lord Chief Justice are such as could not in any event justify, in themselves, an application for a new trial. A judge is entitled to form his own opinion about a plaintiff and his evidence, whether given in examination in chief or cross-examination, and himself to cross-examine whenever he thinks it proper to do so, provided that when the time comes he accurately sets out to the jury the evidence, and gives them to understand that it is their judgment, and their judgment only, upon which the case has to be decided, but I cannot help feeling that the Lord Chief Justice was too greatly influenced when he came to deal with the premature intervention of the jury by the unfavourable opinion he had formed of the plaintiff. In order to understand the importance of the question which ultimately arose it is necessary to state, shortly, the nature and course of the action.

By his statement of claim the plaintiff claimed damages on the ground that the defendants had falsely and maliciously published in their newspaper on March 10, 1925, an article containing some fourteen grossly defamatory statements about him. In substance, the articles charged him with a long career of dishonesty, and association with dishonest people and criminals, and in one or two instances with actual crimes. After setting out the words of the libel, the plaintiff by para. 3 of his statement of claim pleaded that the libel meant (inter alia), and was understood to mean, that the plaintiff had practised dishonest methods all his life, and that he had been all his life a notorious criminal. The rest of the innuendo consisted of a mere repetition of the substance of the defamatory statements appearing on

the face of the libel. The defendants by their defence admitted the publication, and that the words were defamatory, but denied the innuendo, and paid into Court the sum of 1*l.* in respect of the printing and publication of the libel without the meanings set out in the innuendo. It is plain from these pleadings (1.) that the defendants could not escape a verdict for some damages; (2.) that if the innuendo was not merely surplusage, and the words were capable of the alleged meanings, the plaintiff was entitled to have a decision by the jury as to whether the innuendo was proved, as this would have an important bearing on the question of the form of the judgment and the order to be made with regard to costs.

It seems to me convenient at this stage to state certain rules of law that have been established by the decisions. (1.) It is not permissible for a plaintiff to give evidence of particular facts in support of his claim to have a good character, nor is it open to a defendant to give evidence, or to cross-examine as to particular instances with the object of diminishing the damages: see *Scott* v. *Sampson* (1); *Bracegirdle* v. *Bailey* (2); and *Watt* v. *Watt* (3), per Lord Halsbury. (2.) On the other hand, if a plaintiff in chief gives evidence of any fact, and the defendant disputes that fact, the defendant is entitled to cross-examine to credit, and in particular to cross-examine about details of misconduct, but it has been laid down in a number of cases that the defendant is bound to be content with the plaintiff's answers. He cannot contradict them, but must be content to let them go to the jury as the only evidence on the matters involved in the cross-examination; and (3.) if there is any misdirection or other ground for a new trial, the Court cannot speculate as to whether the same verdict would have been given if there had been no such misdirection, and if it is possible that on a proper direction the jury might have given another verdict, the Court cannot then assume that proper direction would have made no difference, and say there has been no miscarriage of justice: *Bray* v. *Ford.* (4)

(1) 8 Q. B. D. 491.
(2) 1 F. & F. 536.
(3) [1905] A. C. 115, 118.
(4) [1896] A. C. 44.

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In this case the plaintiff's counsel, in opening, gave an account of the plaintiff's life before the "Mr. A." case, and put him forward as, apart from the "Mr. A." case, a man of unblemished reputation, and the plaintiff adopted this view himself in his evidence. As the defendants entirely disagreed with this view of his character they were, by their counsel, entitled to cross-examine him to credit. His answers could only be used to remove the impression he had created that, apart from the instance mentioned, he was a man of unblemished character, but, under the circumstances, it would have been difficult for any jury to exclude from their consideration in estimating the damages any admission that he made in cross-examination, but the jury should have been told that they ought, as far as possible, to do so. After a long cross-examination by Mr. Birkett for the defendants, the jury, at the beginning of the third day, sent a message to the Lord Chief Justice. What happened thereon is stated as follows on pp. 178 and 179 of the transcript. My Lord has read it, but in order to make my judgment intelligible I must, unfortunately, read it again. It is the third day: "(The Lord Chief Justice:) Serjeant Sullivan, may I ask you, is it your intention to offer evidence for the plaintiff other than the evidence of the plaintiff himself? (Serjeant Sullivan:) That, when the cross-examination is finished, I will consider" —that was a perfectly proper answer—"(The Lord Chief Justice:) I ask you to consider it now, if you please." Counsel was entitled, if he chose, to say: "My Lord, I still desire to postpone my consideration of it until the plaintiff's evidence is concluded," but he did not take that course. He said: "So far, I did not intend, as the matter stands now. (The Lord Chief Justice:) Very well. Now I have received an intimation from the members of the jury in which they say that they are unanimously agreed that they have heard sufficient evidence in this case. (*To the jury:*) Members of the jury, do you mean by that intimation that upon the plaintiff's own evidence you desire, if you can, to find a verdict for the defendants? (The Foreman of the jury:) Yes, my Lord, that is our opinion. (The Lord Chief Justice:) And

may I take it that as a consequence if, as a matter of law, upon these pleadings, it is necessary that there should be a verdict for the plaintiff for some amount your verdict would be for the smallest possible amount? (The Foreman:) Yes, my Lord. (The Lord Chief Justice:) In other words, for a farthing? (The Foreman:) Yes, my Lord. (Serjeant Sullivan:) Before that result is arrived at, my Lord, I would insist upon addressing the jury. (The Lord Chief Justice:) You would insist, would you? That is a strange phrase to use to me. (Serjeant Sullivan:) I would conceive that I am entitled to insist upon addressing the jury. (The Lord Chief Justice:) Please do not use the word 'insist.' (Serjeant Sullivan:) Not as against your Lordship. I was not using it as against your Lordship. Your Lordship appreciates that thoroughly. (The Lord Chief Justice:) Thank you, Mr. Foreman. I will hear you upon that point, Serjeant Sullivan. Are you entitled to address the jury when the jury have said upon the evidence of the plaintiff himself they are satisfied that he ought not to recover? (Serjeant Sullivan:) I most respectfully submit that I am so entitled. I am entitled to point out on the evidence of the plaintiff, according to the rule of law, that there is nothing to disentitle the plaintiff from recovering substantial damages. (The Lord Chief Justice:) I hear you say that. Mr. Norman Birkett, what do you say?" Then Mr. Norman Birkett says he is loth to make any objection to counsel addressing the jury, and the Lord Chief Justice says: "Very well. Mr. Birkett, let me ask you this question: Do you, in these circumstances, desire to continue the cross-examination of the plaintiff?" and Mr. Birkett says he is content not to continue the cross-examination of the plaintiff. After being pressed by the Lord Chief Justice, Serjeant Sullivan said he did not propose to re-examine the plaintiff, but desired to address the jury, and after discussion he was permitted to do so, but the Lord Chief Justice did not give any direction to the jury on the questions involved in the case, and no question was left to them with reference to the innuendo. In my judgment, having regard to the course of the trial, this was unsatisfactory, and justifies this Court in ordering a new trial.

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It will be observed that when the jury intervened the plaintiff's case was still in progress. The plaintiff had been cross-examined at great length, and by questions which made grave insinuations against him in respect of particular transactions. His evidence was not concluded, and it is conceivable that a different complexion might have been put on some of his answers by re-examination. The time had not come for his counsel to determine whether he would, or would not, re-examine, or whether he would, or would not, call any additional evidence. It seems to me that it would have been right, before his counsel was called upon to form any decision with reference to a message which came from the jury, that he ought to have been told what that message was. If such an intervention had taken place in a simple case which required no special directions on the law and on the facts, counsel would probably have been ready to accept the intimation of the jury, and say that, under the circumstances, he would not proceed further with the case; but the present case was far from a simple one. It was a case in which it was obvious that the plaintiff, by reason of the conviction which he admitted, was at the outset liable to have his right to damages looked at with grave suspicion by the jury. He had put forward the case that, apart from the misconduct involved in the crime of which he had been convicted, he had behaved, with regard to the matters mentioned in the libel, with the propriety that was to be expected from an ordinary normal citizen in his position. The cross-examination had been rightly directed to show that that presentation of his character to the jury was not well founded, but the jury had not been informed that his answers, and his answers alone, afforded the only evidence on which they were entitled to form an opinion on the matters of credit as to which he was cross-examined. The cross-examination began by questions with reference to the number of similar actions he had brought against newspapers for similar libels, and he had to admit that he had settled several of them out of Court without any public vindication of his character. This was obviously a point to be considered by the jury,

though in this connection it is not immaterial to observe that in most of the cases no justification was pleaded, and that in those cases the jury might think it unnecessary that he should insist on the withdrawal in Court of charges which the defendants admitted to be without foundation. He was then cross-examined with reference to various occasions on which he had been cross-examined by counsel, the implied insinuation being that there was something discreditable in the fact that he had been in a position in which it was necessary to cross-examine him, but with reference to these questions no admission was made of anything discreditable. He was then cross-examined as to the kind of clients for whom he appeared, and again nothing discreditable to him appeared from his answers. He was also cross-examined as to his relations with a man named Morrison, a man named Stevens, and a man named Newton, and his answers afforded some ground for saying that he was not too particular about the company he kept. He was then asked (p. 31 of the transcript) whether he agreed that blackmail was the most horrible crime a man could commit. He protested that he had not been guilty of blackmail, but admitted, as he was bound to, that it was a grave offence. Objection was taken that he could not be examined as to the details of this case when there had been no justification pleaded, it being clear, from *Scott* v. *Sampson* (1), that such questions were not admissible for the purpose of diminishing damages. In the first place the learned Lord Chief Justice suggested that the evidence was admissible as showing that the plaintiff was a man of worthless character. After discussion it was pointed out that in any event the questions were admissible as going to credit, and the Lord Chief Justice quite rightly ruled that they were admissible, though at one time he appears to have thought it was on the ground that they were relevant to the mitigation of damages. In that respect he was wrong, having regard to the decision in *Scott* v. *Sampson*. (1) The plaintiff was then asked what he would say about a man who was not only a blackmailer, but a forger. He said he was not a

(1) 8 Q. B. D. 491.

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forger, but, of course, had to admit that forgery was a serious offence. At this stage of the case no questions were put to him of the facts suggested as indicating that he had been guilty of forgery. He was then asked: "Suppose a man deliberately robbed the widow of his best friend could there be any depth of infamy lower than that?" He said he did not do so, but admitted that it would be a serious offence if it had been committed. He was then asked if he were guilty of swindling poor people whether that would be a terrible thing, but at this stage of the case no details were put to him. He was then asked whether he was a friend of confidence tricksters, convicted thieves, and swindlers, and the names of Stevens, Morrison, and Newton were put to him. His answers in effect were that he knew nothing to the discredit of Stevens, and that at the time when he was associated with Morrison he knew nothing to the discredit of Morrison, though he had learned afterwards that he had been convicted of being a suspected person, and received a short sentence. It was suggested that Morrison had been convicted of swindling in Vienna, but the plaintiff said that he knew nothing about that. Newton, of course, was the man with whom he was associated in the "Mr. A." case. It will be observed that up to this point no admissions of any importance had been obtained from the plaintiff except as to the settlement of the other actions, and as to his conviction, and his association with some people of bad character. It had been firmly implanted in the minds of the jury that the defendants' case about the plaintiff was that he had been guilty of forgery, and of robbing the widow of his best friend, and, without any warning to the jury that they could not go beyond the evidence given by the plaintiff on these matters, the jury might well think that such accusations would not be gravely made by counsel unless he was in a position to call affirmative evidence to establish them. He was then cross-examined in detail with reference to the alleged forgery of a cheque for 256*l.* 6*s.*, the forgery alleged being the unauthorized initialling of an alteration of a cheque signed by his employer Mr. Appleton, from "Order" to "Bearer."

According to the plaintiff's evidence it was the custom of Mr. Appleton, who was ill at home, to sign a book full of cheques and to authorize the plaintiff to fill in the cheques for the purpose of paying sums legitimately due from Mr. Appleton, and he produced a power of attorney under which he had power to sign Mr. Appleton's name to cheques. He said he had altered cheques from "Order" to "Bearer" hundreds of times, and had put Mr. Appleton's initials to the alterations. He said he had made and initialled the alteration before the death of Mr. Appleton. The cheque, as I have pointed out, was for 256*l.* 6*s.* The counterfoil in Mr. Hobbs' handwriting was only entered up for 6*l.* 6*s.* He said that this was an oversight on his part, and that he had made out the cheque for 256*l.* 6*s.* in order to provide the sum of 6*s.* for a lady who was entitled to receive it from Mr. Appleton, 6*l.* for office expenses, and 250*l.* to provide him with money either to repay himself moneys he had paid on behalf of Appleton to a Mr. Percival, or to put him in funds to pay the amount which was due from Appleton to Percival, and that he should receive the 250*l.* for this purpose had been arranged by him with Appleton, and he produced documents which, if genuine, proved that this was true. It was proved by his admissions that in fact he had cashed the cheque after Mr. Appleton had died, but according to his sworn evidence, without any knowledge of that fact, and that he refused to pay the money back into the banking account, but he also proved that in the final account between him and the representatives of Mr. Appleton, he was allowed credit for 250*l.*, and a settlement was arrived at on that basis. Under these circumstances, and upon this evidence, it is clear that he could not be convicted of forgery, nor could he be convicted of defrauding Mr. Appleton's widow.

He was also cross-examined about a transaction with clients of Mr. Appleton's which had happened twenty years before, the suggestion being that on behalf of Appleton he had retained for his employer a sum for solicitor and client costs which he was not entitled to retain.

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In my judgment it was unlikely that the jury would have been able to come to a fair conclusion upon the effect of the cross-examination without having their attention called by the judge to the evidence, so as to enable them to judge fairly whether the plaintiff had made any admission which they were, on his evidence, justified in saying amounted to an admission of criminal conduct, and without it being pointed out to them that however emphatic the questions were that were put to him, they were bound to deal with the case upon his answers, and upon his answers alone, inasmuch as this was a collateral matter on which neither the defendants nor the plaintiff could call evidence either, in the one case, to corroborate, or, in the other case, to displace the evidence given by the plaintiff. I am further of opinion that the jury ought to have been told that their intervention was premature, that they must keep an open mind until the conclusion of the plaintiff's case, that inasmuch as the defendants' counsel had put in documents the plaintiff's counsel would be entitled not only to re-examine, but to address the jury last. I think also they ought to have been told that in estimating the amount of the damages they were entitled to consider, not merely the character of the plaintiff, but also the conduct of the defendants; that a man does not lose his right to damages because his character is not free from reproach, that a man with a damaged character is entitled to have his damaged character protected, and if newspapers for their own purposes falsely allege that he has been guilty of crimes and misconduct the jury might well consider that even a man of bad character ought not to have his character made out to be blacker than the proved facts warrant. I am also of opinion that the jury ought to have been asked to consider whether the words of the libel meant all that was said in the innuendo. It was necessary to ask this question, because if they found the innuendo proved, then, even if they gave a verdict for one farthing, though the plaintiff might have been deprived of his costs, it would not have been right to say that he ought to pay the whole costs of the action.

We were urged by Mr. Birkett to say that this appeal ought not to be allowed because there was no miscarriage of justice, as it is quite clear that whatever the summing-up had been the jury would have adhered to the view they had expressed. I do not think we are entitled to speculate as to what the jury would have done, nor am I entirely satisfied that if there had been a sufficient direction to the jury that they should keep an open mind till the end of the case, and a sufficient direction as to the extent of the plaintiff's admissions, the jury would necessarily have remained of the same opinion as they had prematurely expressed.

For these reasons I think there should be a new trial, and I agree with my Lord that it follows that in the second case—*Hobbs* v. *Nottingham Journal, Ld.*—there should be an extension of time to appeal from the order refusing to adjourn, and that the default judgment should be set aside, and a new trial ordered in that case also.

SANKEY L.J. I agree that there must be a new trial, but in view of that fact I do not propose to comment at length upon the case. This litigation has been most unfortunate, and the trouble is mainly due to the premature action of the jury in stopping the case when the cross-examination of the plaintiff was not half-way through. I say "not half-way through," for the learned counsel for the defendants had been cross-examining for about a day and a half when the jury gave their decision, and then he said that he had still two days' cross-examination left.

The action was a peculiar one. The plaintiff, a man of disreputable character, was claiming damages for injury to his reputation. His counsel had to present him to the jury as a man who had recently come out of prison after a sentence of two years' hard labour for a disgraceful conspiracy. On the other hand, the defendants were the owners of a newspaper and had to admit that they had spread a number of lies about the plaintiff, for they had published a number of bad libels on him. Their defence was of an unusual character. It admitted the publication of the libels

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but denied the innuendo, and paid into Court the sum of 20*s*. The learned counsel who drew the defence was doubtless wise in so doing, so as to prevent at the time when he drew it the question being one of damages only. Subsequently the defendants served notice under Order XXXVI., r. 37, of circumstances upon which they relied in mitigation of damages. It is possible in such a case to imagine one juryman saying: "The plaintiff's character is so bad that he only ought to have a farthing, whatever the defendants have said," and on the other hand another saying: "It is unfair to kick a man when he is down, to accuse him untruly of having done many worse things, especially as their object was to increase their own circulation and enhance their own profits." It might be contended that the iniquities were equal. In this state of affairs the case wanted very careful and patient investigation, which in my view it did not receive.

With reference to the first ground in the notice of appeal, namely, that the learned Lord Chief Justice prejudiced the jury, I think that in respect of the affidavit of documents he was under a misapprehension, due possibly to his not appreciating the opening speech of the learned counsel for the plaintiff. At the moment when the affidavit was sworn the documents which it was complained were not included, could not, in the then state of the case, be relevant and need not have been included. It is unfortunate that the Lord Chief Justice did not appreciate that the submission of the learned counsel for the plaintiff was correct. The Bar is just as important as the Bench in the administration of justice, and misunderstandings between the Bar and the Bench are regrettable, for they prevent the attainment of that which all of us desire—namely, that justice should not only be done, but should appear to have been done. With regard to the remaining grounds on which it is suggested that the jury were prejudiced, none of them is of sufficient weight to entitle the plaintiff to a new trial. The learned Lord Chief Justice, as appears from the shorthand note, evidently took what is sometimes described as a strong view against the plaintiff, but a judge is entitled to express his opinion provided

he properly leaves questions of fact properly to be determined by the jury: see *Rex* v. *O'Donnell* (1), where Lord Reading C.J. said (2): "A judge, when directing a jury, is clearly entitled to express his opinion on the facts of the case, provided that he leaves the issues of fact to the jury to determine. A judge obviously is not justified in directing a jury, or using in the course of his summing up such language as leads them to think that he is directing them, that they must find the facts in the way which he indicates. But he may express a view that the facts ought to be dealt with in a particular way, or ought not to be accepted by the jury at all. He is entitled to tell the jury that the prisoner's story is a remarkable one, or that it differs from accounts which he has given of the same matter on other occasions. No doubt the judge here did express himself strongly on the case, but he left the issues of fact to the jury for their decision." The point may be tested by putting the converse case. If a judge has a strong belief in the prisoner's innocence, ought he to strive for a verdict of not guilty? It is impossible to argue that there is one principle only in the law. There are many principles; and one principle must recognize the necessity of accommodating itself to another principle. The decision in such a case is for the jury, and the duty of the judge is to see that the proper facts, and the proper law appertaining to them, are properly placed before the jury. I should be disposed to say that a judge who delivers a manifestly hostile summing-up accentuating all the points against the litigant and omitting those in his favour, or a jury who return a premature verdict, are failing in their functions. In a strong desire to do justice a judge may make mistakes. So may counsel. So may a jury. It is easy to criticize, but no system can ensure infallibility; the best it can do is to provide for finality. In attaining finality, open Courts and a vigilant Bar will reduce the margin of error to a minimum.

Dealing with the cross-examination of the plaintiff, I am of opinion that it was legitimate in so far as it purports to be a cross-examination as to credit, but great care has to be taken

(1) (1917) 12 Cr. App. R. 219. (2) (1917) 12 Cr. App. R. 221.

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to see that a jury appreciates, though it may be a difficult task for them, that answers given to such a cross-examination may not be relevant upon the issue of mitigation of damages. The law is beyond question. The decision in *Scott* v. *Sampson* (1) states clearly the evidence that is admissible upon the issue of mitigation of damages. Cave J., after dealing exhaustively with the authorities, divides the evidence which it was suggested might be given in mitigation of damages into three heads: (1.) general evidence of reputation, which is admissible; (2.) evidence of rumours and suspicions to the same effect as the defamatory matter complained of, which is not admissible, as only indirectly tending to affect the plaintiff's reputation; (3.) evidence of facts and circumstances to show the disposition of the plaintiff, which is also inadmissible. No further word need be added to that judgment. Order XXXVI., r. 37, as to mitigation of damages was passed after the decision. *Watt* v. *Watt* (2) shows clearly that it is not permissible in mitigation of damages to go into evidence which, if proved, would constitute a justification which has not been pleaded, and it makes no difference that this evidence is offered in cross-examination.

A long argument was addressed to us as to the limits and effect of cross-examination as to credit, and a number of cases were cited, especially *Attorney-General* v. *Hitchcock* (3): see also *Palmer* v. *Trower*. (4) An opponent may be cross-examined as to his credit, but he cannot be contradicted upon any point not material to the issue in order to show that his evidence is not to be believed. The Indian Evidence Act (I. of 1872), s. 153, correctly sums up the English law on the subject, and is as follows: "When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him; but if he answers falsely, he may afterwards be charged with giving false evidence." The Court can always exercise its discretion to decide whether a question as to credit is one

(1) 8 Q. B. D. 491.
(2) [1905] A. C. 115.
(3) 1 Ex. 91.
(4) (1852) 8 Ex. 247.

which the witness should be compelled to answer, and in my view, again referring to the Indian Evidence Act, s. 148, in the exercise of its discretion the Court should have regard to the following considerations: "(1.) Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies. (2.) Such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies. (3.) Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence." In a case like the present it is incumbent on the presiding judge, and vital to a proper trial, to explain clearly to the jury the inference to be drawn and the legal effects of the answers given by a plaintiff to a cross-examination as to credit. Owing possibly to the jury's premature decision, the learned Lord Chief Justice was deprived of any opportunity of doing this, and the jury returned their verdict without any direction on this head. That, in my view, vitiates the proceedings. It was argued for the appellant that the tribunal must always believe the answer of a witness given to a question which affects his credit. I am not prepared to accept that contention. Where such a question and answer are the only ones, different considerations may apply, but it cannot be that the tribunal is bound to believe an answer if, having regard to the whole of the witness's evidence, they come to the conclusion that he is not a trustworthy person. Suppose at the beginning of a cross-examination as to credit the witness returns one answer, and later on he returns just the opposite answer to the question when put again. Is the Court to accept both answers as true?

Complaint was made that the learned Lord Chief Justice did not show to counsel communications sent to him by the

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jury, but, as he told the parties the gist of the communication, the complaint is unfounded. In my view whether a learned judge should or should not show every communication he receives from the jury to the parties and their advisers is a matter for the discretion of the judge himself. Having regard to the different situations which may arise, it is impossible to lay down any hard and fast rule on the subject, but I think it will be found that the better practice in nearly every case will be for the judge to show the communication to the parties, informing them what answer he proposes to make to it and asking for their observations before giving the answer to the jury. There may be an exception in the case where a jury sends up a note asking for an increased remuneration. Even there it is better practice for the judge to tell the parties, but not to ask them for their opinion if it is likely to embarrass a poor litigant who does not like to refuse to pay the extra fee. There the judge, after telling the parties of the application, should say that the jury are not entitled to it.

The real difficulty in the way of the respondents arises from the fact, as above stated, that the jury were premature in coming to a conclusion before the cross-examination was half-way through and consequently received no direction from the learned Lord Chief Justice. A perusal of the note will show that the Lord Chief Justice himself was embarrassed by this action. He said to the jury (p. 198): "It is now half-past eleven. Are you still of the same mind? (The Foreman:) Yes, my Lord. (The Lord Chief Justice:) And does that mean that you desire if you may to find for the defendants? (The Foreman:) We desire to find for the plaintiff. (The Lord Chief Justice:) You mean the defendants, do you not? (The Foreman): That is what we want to know. (The Lord Chief Justice:) You know the plaintiff is the man who is bringing the action? (The Foreman:) Yes, I understand that." Plaintiff's counsel was also in a very difficult position in having to address a jury who had made up their minds, while in the hurry of the moment the defendants' counsel, although he had put in evidence, claimed a right of

reply, which, however, he did not subsequently use, although in the exercise of a generous discretion (p. 179) he said he was very loth, if his learned friend desired to address the jury as counsel, to appear to be in opposition to it. The jury were not directed as to the difference between the effect of answers given to questions impeaching the plaintiff's credit and answers to questions properly asked and directed to a mitigation of damages. Indeed, they were not directed at all, and the question of the innuendo was not even mentioned to them. They may have expected witnesses would be called as to certain charges of forgery and perjury and have assumed that the plaintiff was guilty of these charges having regard to the way he gave his evidence in reference to them, although as a matter of fact the charges went to his credit, were not proved, were denied by him, and witnesses could not be called to contradict him when, on such a cross-examination to credit, he denied them.

Learned counsel for the respondents repeatedly pressed us with the argument that owing to the opening of the plaintiff's counsel all the ordinary rules with regard to evidence in mitigation of damage went by the board, that the sole question in dispute was the character of the plaintiff, that the result of the trial was correct, and that no jury would give the plaintiff more than a farthing, and we need not look too strictly upon the means by which the result was obtained. With this I profoundly disagree. It is not admissible to do a great right by doing a little wrong. The inequalities of life are not so dangerous in a State whose subjects know that in a Court of law at any rate they are sure to get justice, and it is not sufficient to do justice by obtaining a proper result by irregular or improper means.

In *Bray* v. *Ford* (1) Lord Halsbury, the Lord Chancellor, said (2): "I think there has been a substantial wrong, since I think the defendant was not permitted to present his case to the jury with the argument that his original complaint was true." Lord Watson said (3): "Every party to a trial

(1) [1896] A. C. 44. (2) [1896] A. C. 47.
(3) [1896] A. C. 49.

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by jury has a legal and constitutional right to have the case which he has made, either in pursuit or in defence, fairly submitted to the consideration of that tribunal. In the present instance the case made in evidence by the appellant was not submitted to the jury." Lord Herschell said (1): "The Court may think, as I might think in the case before your Lordships, that the jury would have given the same damages if the law had been correctly expounded; but this is a mere matter of speculation; it cannot be asserted with the least certainty that they would have done so. The jury have returned their verdict on what they were erroneously led to think was the case, and not on the real case which the defendant was entitled to have submitted to them." The respondents' counsel prophesies the result will be the same on a new trial. Upon that question I entirely decline to speculate. Should the same result be achieved after a regularly conducted trial, it may well be that the plaintiff will have to put up with it, for a properly directed jury is the tribunal constituted by our country to give a decision in such a case as the present; but the plaintiff must have a proper chance of trying to persuade them to give a verdict in his favour—a chance which he has not yet had.

For the reasons I have given, I think the appeal succeeds and a new trial must be ordered. I agree, too, with the other members of the Court with regard to the orders to be made in respect of the interlocutory appeal and the other final appeal, and in the terms which have been mentioned by my Lord.

Appeal allowed.

Solicitors for appellant: *Edmond O'Connor & Co.*
Solicitors for respondents: *Oswald Hickson, Collier & Co.*

(1) [1896] A. C. 53.

J. S. H.

FLEETWOOD-HESKETH *v.* FLEETWOOD-HESKETH.

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1928
July 27.

[1927. F. 1817.]

Husband and Wife—Separation Deed—Construction—Wife's Income—Super-tax—Husband's Covenant to pay Tax on Part—Apportionment.

A husband and wife lived apart upon the terms of a separation deed by which the husband covenanted during the joint lives of himself and his wife to pay to trustees for the benefit of the wife such a sum in each year as, after deducting income tax at the current rate, should amount to the sum of 3000*l.*

Clause 11 of the deed was in these terms: "In addition to all other payments by this indenture agreed to be made by the husband or his representatives after his decease he or they shall pay and discharge all super-tax which shall be payable in respect of the income of either the husband or the wife except any super-tax in respect of any income of the wife not coming to her under or by virtue of this indenture in excess of 1400*l.* for any year." Apart from the deed the wife had an income exceeding 1400*l.* a year:—

Held that, in computing the super-tax payable by the husband in respect of the income of the wife, the husband was not entitled to marshal the component parts of the wife's income so that one part—namely, the annual amount payable under the deed plus 1400*l.*—should be exempt from super-tax as to 2000*l.* thereof and as to the balance should bear the lower rates of tax, and that the higher rate of tax should fall upon another part—namely, the excess of the wife's total income over the first mentioned part; but that clause 11 of the deed required that the whole super-tax payable in respect of the total income of the wife should be divided in the proportion which the amount of one of the above mentioned parts of the wife's income bore to the amount of the other, and that the husband should pay super-tax in the proportion which the first mentioned part bore to that secondly mentioned.

APPEAL from the judgment of MacKinnon J. on the trial of the action before the learned judge without a jury.

On January 4, 1924, a separation deed was executed between the defendant and his wife, the plaintiff. The deed contained the covenants, and particularly the covenant embodied in clause 11, set out in the headnote.

In addition to the amount payable to her under the deed, the plaintiff had income from other sources which exceeded 1400*l.* For the three years ending in 1927 the defendant paid in respect of super-tax on the plaintiff's income a sum which bore the same proportion to the super-tax on the

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plaintiff's entire income as her income under the deed plus 1400*l.* bore to her entire income. But in 1928 he was advised that he had overrated his liability under the deed, and that he was only liable to pay super-tax on the net income coming to the plaintiff under the deed, plus the income tax thereon, plus 1400*l.*, and that of this aggregate amount, which exceeded 5000*l.*, the first 2000*l.* was free from super-tax altogether. Accordingly, when making a payment under the deed in 1928, he deducted what he believed he had overpaid. The plaintiff brought the action to recover the amount deducted, wrongfully as she alleged. The defendant counterclaimed a declaration to the effect that he was only liable to pay super-tax as upon an income made up of (1.) the annual payments under the deed, and (2.) a sum not exceeding 1400*l.*

MacKinnon J. gave judgment for the defendant upon the claim and made the declaration as prayed.

The plaintiff appealed.

Farwell K.C. and *F. D. Morton* for the appellant. The learned judge has assessed the husband's liability under the deed upon a wrong basis. The mistake is in taking 3000*l.* plus income tax thereon, the sum payable under the deed, plus a sum of 1400*l.*, as "the income of . . . . the wife." If that assumption was justifiable the judgment would be right; the first 2000*l.* would be exempt from super-tax, the next 500*l.* would be subject to tax at the rate of 9*d.*, the next at 1*s.*, and so on according to the list in s. 14 of the Finance Act, 1925. But the income of the wife exceeded the amount payable under the deed plus 1400*l.* by a sum of about 400*l.* According to the contention of the respondent and the judgment under appeal, this sum is not to partake in the benefit of any exemption but is to bear the heavier rate of tax, while the sum payable under the deed shares in the exemption and bears the lighter burden. The question is what is the "super-tax in respect of" this surplus of the wife's total income over and above the sum payable under the deed plus 1400*l.* It is submitted that the super-tax upon this surplus must bear the same

proportion to the super-tax on the whole of the wife's income as the surplus itself bears to her whole income. Or, to put it in another way, the super-tax on the wife's total income should be divided into two parts in the proportion which the surplus mentioned above bears to the remainder of her total income. The smaller of these parts is the amount to be paid by the wife, and the husband must pay the larger. This is in accordance with the judgment of Sargant J. in *In re Bowring* (1) and *In re Doxat.* (2) The learned judge followed *In re Lord Armaghdale* (3), but in that case there was an express direction in the will that the amount of super-tax payable by the annuitant should not be apportioned between the various sources of the annuitant's income. In the present case there is no such direction. In the absence of that or an equivalent provision in the deed it is unfair and unreasonable that the sum payable by the husband under the deed should enjoy any preferential treatment over the wife's private sources of income.

[*In re Bowen* (4) was also cited.]

C. A. Bennett K.C. and *Valentine Holmes* for the respondent. A covenant by a husband to pay super-tax on 5000*l.* of his wife's income and no more would surely mean that he should not pay anything upon the first 2000*l.* and that he should pay on that sum and the balance the super-tax payable upon an income of 5000*l.* Presumably he intended to incur a charge which he had the means of assessing. He could calculate the amount of super-tax payable upon an income of 4400*l.* But if the contention of the appellant were to prevail, the husband would never know the amount of his liability, for he has no means of knowing what the surplus of his wife's income over and above 4400*l.* may amount to. Moreover the greater the amount of that surplus the heavier the burden he would have to bear. It is not probable that he should undertake such an obligation as that.

Counsel for the appellant were not called upon in reply.

(1) [1918] W. N. 265.
(2) [1920] W. N. 262.
(3) [1928] W. N. 26.
(4) [1925] W. N. 206.

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LAWRENCE L.J. This appeal raises a short point of construction upon clause 11 of the deed of separation, which is in the following terms: [The Lord Justice read the clause and proceeded:] The net annual income coming to the wife under or by virtue of the deed after deduction of income tax is 3000*l.*, the total sum payable in respect of which is over 4000*l.*, the difference representing the income tax. In addition to the income coming to the wife under the deed, she has income from other sources which exceeds 1400*l.* The question now arises how the super-tax in respect of the total income of the wife is to be apportioned between the husband and the wife so as to make each bear the right proportion in accordance with the terms of clause 11.

The husband contends (and this contention met with success in the Court below) that his liability is limited to the payment of super-tax at a rate applicable to a total income made up of the amount coming to the wife under the deed and an added amount of 1400*l.* In other words he seeks to assess his liability on the footing that his wife's total annual income consists of the two amounts I have mentioned, in which case he would of course be entitled to the whole benefit of the exemption in respect of the first 2000*l.* and to the benefit of the graduated amounts in respect of the balance. In my opinion that contention does not give to clause 11 its true meaning and effect. On the true construction of that clause the husband has in my judgment to defray the liability of the wife for super-tax in respect of her total income with the sole exception of such super-tax as is properly apportioned to any income over and above the deed income and 1400*l.* The wife has to pay super-tax on the whole of her income, and in order to ascertain the amount of super-tax payable by the husband in respect of his wife's income her total income must be treated as being divided into two parts, the one consisting of the deed income plus 1400*l.* and the other consisting of the balance of her income over that amount. The proper way of apportioning the super-tax between the parties is not to marshal the two parts of the wife's income so that either part may come first and

profit by the exemption and the lighter burden of the lower scale of payments and thus throw the burden of the heavier rate upon the other part, but to apportion the super-tax payable on the total income of the wife upon both the component parts of that income in the proportion which the amount of the one bears to the amount of the other.

Several cases have been referred to. I agree with counsel that they do not really govern the decision of this case. In *In re Bowring* (1) the testator gave to his wife an annuity of 4000*l.* free of income tax and super-tax. The annuitant had other gross income outside the will of 1637*l.* a year. The question was whether the super-tax directed by the will to be paid by the trustees on the annuity ought to be calculated on the annuity with or without reference to the 1637*l.* No limit was fixed by the will on the total amount of the wife's income in respect of which super-tax was to be calculated. Sargant J. held that the total amount of the super-tax payable by the annuitant ought to be apportioned rateably between the annuity and the 1637*l.*, the estate being only liable to bear the amount so apportioned to the annuity. In the present case MacKinnon J. considered himself bound to follow the decision of Russell J. in *Lord Armaghdale's* case. (2) In that case, however, there was a special direction in the will that there was to be no apportionment and that super-tax was to be paid upon a super-taxable specified sum. In those circumstances the learned judge rightly held that he could not apportion the super-tax between the income coming under the will and the other income of the annuitant. This decision has no bearing upon the present case, because the testator's directions on which it was founded have no counterpart here.

In the present case the learned judge has in effect marshalled the two parts of the wife's income so as to make that part which consists of the deed income and the 1400*l.* come first in order in the total income of the wife and thus obtain the benefit of the exemption and lower rates of payment at the expense of the other part of the wife's income.

(1) [1918] W. N. 265. (2) [1928] W. N. 26.

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There is nothing in the deed to justify the adoption of such a course, and in my opinion the decision of the learned judge was erroneous. The appeal therefore succeeds, with the result that the wife is entitled to judgment for the sum claimed.

GREER L.J. I am of the same opinion. The plaintiff is a married woman; the defendant is her husband, and the two parties are living apart. When the husband and wife are living together the income of the wife is added to the income of the husband for the purposes of income tax and super-tax, and the husband has to pay income tax and super-tax upon the aggregate income of both the parties. When the husband and wife are living apart each of them is dealt with as if their incomes were separate, and the income of the wife is estimated as if she were a feme sole.

When we come to determine the true meaning of clause 11 of the deed of separation the first thing to be kept in mind is that we are not dealing with the husband's income at all; we are dealing with the wife's income. Now it is not possible to establish that the first 2000*l.* of the plaintiff's income, upon which under s. 14 of the Finance Act, 1925, nothing has to be paid, is that part of the income which arises under the deed, nor is it possible to establish that it is to be attributed in the first instance to income which she derives independently of the deed. In this case during the year 1924–1925 she had an income of 4257*l.* 10*s.* from the deed and an income of 1795*l.* 10*s.* from sources other than the deed. I do not see how this aggregate income of 6053*l.* can be treated as an income in slices or how one slice can be taken as exempt from tax, another slice subject to a tax of 9*d.* in the £, and so on through the list, so far as applicable, which forms part of s. 14 of the Finance Act, 1925. The tax is payable upon the whole of the wife's income, and it is impossible to say which particular part of it pays nothing, which pays 9*d.*, and which pays some other amount. The clause in question runs thus: "The husband or his representatives . . . . shall pay and discharge all super-tax which shall be payable

in respect of"—leaving out husband's income for the time —"the income of . . . . the wife." There is therefore a covenant to pay super-tax upon the whole of the wife's income, with a certain exception, not an exception of so much of the income as is exempt from super-tax, but an exception of that part of the super-tax which is not to be paid by the husband. It reads as follows: "Except any super-tax in respect of any income of the wife not coming to her under or by virtue of this indenture in excess of 1400*l.* for any year." In my view it is straining the words to argue, as Mr. Bennett did, that the words "in excess" indicate that so much of the wife's income independent of the deed over and above 1400*l.* can be treated as the top slice of her total income which has therefore to bear the heaviest rate of super-tax and is to have no share in the benefit of exemption of the first 2000*l.* I read the words "the excess" in s. 14 of the Finance Act, 1925, as merely a convenient method of describing how the total amount payable on any given income is to be estimated, and not as a direction that the income is to be separated into slices, of which the lowest is to be free from super-tax and the highest is to bear the heaviest charge, and intermediate parts bear burdens graduated according to their relative positions. I agree that the cases which have been cited are not conclusive one way or the other, but I think the decision of Sargant J. (as he then was) in *In re Bowring* (1) is useful as providing a formula applicable to the future dealings with the income of the plaintiff and the future application of clause 11. The words which seem to me to apply to this case, when the argument of the appellant is accepted, are those which follow. After referring to the total income of the wife, the learned judge said: "The various sources of income which she was entitled to must be taken rateably as making up the total income, so that an aliquot proportion of each was attributed to the first 2500*l.*"—it would now be 2000*l.*—"a year which was free of super-tax, another aliquot proportion attributed to the 500*l.* between 2500*l.* and 3000*l.*, which bore the lowest

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rate of super-tax, and successive aliquot proportions attributed to the other successive excesses of income, which bore rateably higher rates of tax." I agree that the appeal should be allowed.

SANKEY L.J. I agree, and should have added nothing to the judgment of Lawrence L.J. but for the fact that we are differing from the learned judge in the Court below. I appreciate Mr. Bennett's point that the construction we are putting on this clause may in certain events lead to unexpected results; but those results ought not to deter us from giving to the words their true meaning. It is clear that the clause deals with the total super-tax upon the wife's income. The words are: "In addition to all other payments by this indenture agreed to be made by the husband or his representatives after his decease he or they shall pay and discharge all super-tax which shall be payable in respect of the income of . . . . the wife." So far there is no difficulty. Nothing is said about rates of tax, or about the first 2000*l.* which is exempt from super-tax, and nothing is said about marshalling. The clause takes into account the whole income of the wife and the super-tax payable in respect of it. Then it says that a deduction or an exception is to be made; but not from the income. The words are "except any super-tax in respect of any income of the wife not coming to her under or by virtue of this indenture in excess of 1400*l.* in any year." It is quite impossible in my view to find in this clause any ground for discriminating between different parts of the wife's income or preferring one part before another, so as to benefit either the wife or the husband. The super-tax upon the total income of the wife is to be apportioned between the husband and the wife in accordance with clause 11. For that purpose one must take the sum by which the annual income of the wife from sources other than the deed exceeds 1400*l.* As that sum is to the plaintiff's total annual income so is the amount of super-tax she has to pay to the amount of super-tax payable in respect of her total annual income. That is a simple sum. In the conclusion I have come to, that this is the proper

method of apportioning the super-tax, I am fortified by the fact that this was the method which the husband's own accountants adopted as the proper way in which to perform the terms contained in clause 11. I therefore agree that the appeal should be allowed.

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Appeal allowed.

Solicitors for appellant: *Parson, Lee & Co.*
Solicitors for respondent: *Lewis & Lewis.*

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Local Government—Housing—Houses—Fitness for human Habitation—Work done by Local Authority—Expenses—"Owner"—"Person receiving Rackrent"—Solicitor acting for Administratrix—Builder collecting Rents—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 4—*Public Health (London) Act*, 1891 (54 *&* 55 *Vict. c.* 76), *s.* 141—*Housing, Town Planning, &c., Act*, 1919 (9 *&* 10 *Geo.* 5, *c.* 35), *s.* 28.

By s. 28 of the Housing, Town Planning, &c., Act, 1919 (now repealed and replaced by s. 3 of the Housing Act, 1925), if the owner of any house suitable for occupation by persons of the working classes fails to keep it in all respects reasonably fit for human habitation, the local authority may serve a notice upon him requiring him to execute such works as may be necessary. If the notice is not complied with the local authority may do the work required, and any expenses incurred by them in so doing may be recovered in a Court of summary jurisdiction from the owner. "Owner," by reference to s. 4 of the Public Health Act, 1875 (or s. 141 of the Public Health (London) Act, 1891), means "the person for the time being receiving the rackrent of the lands or premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person." . . . .

The owner of houses within the Act employed a builder to collect the rents. When the owner died a dispute arose between his widow and his son-in-law concerning probate of his will, pending which the son-in-law instructed the builder to continue collecting the rents. The son-in-law commenced a suit in the Probate Division in which one W. acted as solicitor to the widow. He requested the builder not to part with the rents he had collected, as they would have to be accounted for to the person entitled to them. The suit was compromised on the terms that letters of administration should be granted to the widow, and that the houses should be sold. Thereafter the builder applied to W. for

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instructions and received instructions from him whenever payments were to be made out of the rents or accounts were to be rendered relating to them, and paid him the amount of the rent, or the balance, if any, as the case might be. In February, 1925, the houses not being in all respects reasonably fit for human habitation, the local authority served on W. notices requiring him, as the owner of the houses, to execute the necessary work, and, on his failing to comply with the notices, did the work themselves and summoned W. for non-payment of the cost:—

Held (by Scrutton and Sankey L.JJ.; Greer L.J. dissenting), that W., and not the builder, was the owner of the houses within the meaning of the Act; Greer L.J. being of opinion that the builder, and not W., was the owner.

Decision of Divisional Court [1928] W. N. 290 affirmed.

APPEAL from the decision of a Divisional Court (1) upon a case stated by a magistrate of a Metropolitan Police Court in the following circumstances:—

John Nixon Watts was summoned by the Battersea Borough Council to answer three claims for 195*l.* 12*s.*, 268*l.* 15*s.* 6*d.*, and 247*l.* 16*s.* 7*d.* respectively, amounting to 712*l.* 4*s.* 1*d.*, being the expenses incurred by the Borough Council in executing at three dwelling-houses, Nos. 18, 19 and 20 Belfour Street, in the borough of Battersea, the works necessary to make the same in all respects reasonably fit for human habitation, with interest on the said sums at 5 per cent. per annum from December 30, 1925, the date of service of demands on the said J. N. Watts.

The magistrate ordered the said J. N. Watts to pay to the Borough Council the sums claimed with interest, but on the application of Watts, who was dissatisfied with the decision, stated a case in which the following facts were admitted or proved:—

(i.) In the year 1921 the said houses were purchased for 100*l.* by Edward James Henry Wallis from the leaseholder, who held leases expiring in 1956 at the following ground rents: No. 18, 3*l.* 10*s.*, No. 19, 4*l.*; No. 20, 4*l.*

(ii.) The rateable values of the three houses were: No. 18, 13*l.*; No. 19, 13*l.*; No. 20, 11*l.*

(iii.) The rents of the three houses were: No. 18, 12*s.* 6*d.* a week (32*l.* 10*s.* a year); No. 19, 12*s.* 6*d.* a week (32*l.* 10*s.* a year); No. 20, 12*s.* a week (31*l.* 4*s.* a year).

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(iv.) and (v.) At all material times the houses were suitable for occupation by persons of the working class and were let at rackrents.

(vi.) The said E. J. H. Wallis died on February 2, 1922, leaving a widow and one son.

(vii.) During his life the said E. J. H. Wallis employed one G. R. Spicer, a builder, to collect the rents of the said houses.

(viii.) By a will dated January 15, 1922, the said E. J. H. Wallis bequeathed Nos. 18 and 19 Belfour Street to his widow and No. 20 to his son. By another will dated January 31, 1922, he otherwise disposed of the same. Legal proceedings followed relating to the said wills, in which the testator's son-in-law Lawrence Vivian Clark was the plaintiff and the widow was the defendant. In these proceedings J. N. Watts acted as solicitor for the widow. The proceedings were settled, and on December 16, 1922, letters of administration with the will of January 15 annexed were granted to the widow. It was provided by the settlement that the three houses should be sold, and that the costs of the plaintiff L. V. Clark should be paid out of the net proceeds and that the widow should pay her own costs.

(ix.) After the death of E. J. H. Wallis the said G. R. Spicer was verbally directed by the said L. V. Clark to continue to collect the rents of the said houses as before.

(x.) By a letter dated February 23, 1922, J. N. Watts requested the said G. R. Spicer not to "part with any of the rents of the said three houses," which he understood the said G. R. Spicer collected, as they would "have to be accounted for to the person entitled."

(xi.) As the ground rents and other outgoings became payable in respect of the houses the said G. R. Spicer applied to J. N. Watts for instructions, and received instructions from him to pay them out of the rents.

(xii.) On or about December 15, 1922, the said G. R. Spicer paid the sum of 25*l.* to J. N. Watts, and by a letter dated December 15, 1922, stamped with a two-penny stamp, J. N. Watts acknowledged the said sum in the following terms: "Re Wallis deceased. We are obliged for your

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cheque for 25*l.* on account of rent herein. Kindly treat this letter as our receipt. Yours faithfully J. Nixon Watts & Co."

(xiii.) By a letter dated July 18, 1923, A. H. Wallis, the son of E. J. H. Wallis deceased, requested the said G. R. Spicer to forward him an account of the amount paid by him to J. N. Watts and of the amount then in hand, and by a letter in reply dated July 19, 1923, the said G. R. Spicer informed the said A. H. Wallis that he was sending his said letter to J. N. Watts, and that on receipt of an order from J. N. Watts he would be pleased to send A. H. Wallis the information asked for.

(xiv.) The said G. R. Spicer forwarded to J. N. Watts the letter of July 18, 1923, from A. H. Wallis.

(xv.) By a letter dated July 24, 1923, J. N. Watts informed the said G. R. Spicer that he had written to A. H. Wallis; he went on to say that A. H. Wallis was entitled to have an account, and continued: "We," i.e. J. N. Watts & Co., "shall be glad if you will let us have a statement showing the rents received and payments made in respect of each of the houses so that we can ascertain what balance, if any, is due to him."

(xvi.) On or about July 31, 1923, the said G. R. Spicer sent to J. N. Watts an account of the rent of one of the houses with a letter informing J. N. Watts that he was preparing the account of the other two houses and thought there would be a balance in respect of the three houses of about 47*l.* less the said sum of 25*l.* advanced to him.

(xvii.), (xviii.) and (xix.) On October 29, 1923, the said G. R. Spicer delivered to J. N. Watts an account of the rents and outgoings and paid him the balance, 11*l.* 18*s.* 7*d.*; on May 1, 1924, he delivered another account and paid him the balance, 19*l.* 16*s.* 3*d.*; and on October 7, 1924, he delivered a third account and paid him the balance, 3*l.* 16*s.* 8*d.*

(xx.) The said G. R. Spicer never at any time paid or accounted for any of the said rents to the widow or son of E. J. H. Wallis deceased, except on one occasion immediately after the death of E. J. H. Wallis, when he sent one account to the widow and she referred him to J. N. Watts.

(xxi.) The sums of 25*l.*, 11*l.* 18*s.* 7*d.*, 19*l.* 16*s.* 3*d.* and 3*l.* 16*s.* 8*d.* so paid by the said G. R. Spicer to J. N. Watts as aforesaid amount to 60*l.* 11*s.* 6*d.* in all. J. N. Watts' bill of costs against the widow of E. J. H. Wallis amounted to 65*l.* 12*s.*, so that the sum of 5*l.* 0*s.* 6*d.* was at the date of the hearing still owing to J. N. Watts.

(xxii.) The Battersea Borough Council, as the rating authority for the borough of Battersea, addressed to "G. R. Spicer for E. J. Wallis deceased Estate" notices informing him of the amount of the rates and that if payments were made by him the Borough Council would refrain from serving demands for the same upon the occupiers. They addressed in the same manner their receipts for rates paid by him.

(xxiii.) In November, 1924, the medical officer of health to the Borough Council wrote to J. N. Watts with regard to the condition of the three houses. On November 29, 1924, J. N. Watts wrote to the medical officer saying "We have asked our builder, Mr. Spicer, to interview you on our behalf." At the interview which followed the said G. R. Spicer told the medical officer that he was collecting the rents on the instructions of J. N. Watts. On December 23, 1924, J. N. Watts wrote to the medical officer saying that he had been "in communication with the collector for this estate," and adding "You are of course aware that this is a very small estate and our client, who is the widow of the late owner Mr. Wallis, has no means," and asking for leniency in the Council's requirements.

(xxiv.) On February 4, 1925, the said three houses were not in all respects reasonably fit for human habitation and the Borough Council served on J. N. Watts three notices in respect of them under s. 28, sub-s. 1 (1), of the Housing,

(1) Housing, Town Planning, &c., Act, 1919: "Sect. 28.—(1.) If the owner of any house suitable for occupation by persons of the working classes fails to make and keep such house in all respects reasonably fit for human habitation then . . . . the local authority may serve a notice upon the owner of such house requiring him within a reasonable time, not being less than twenty-one days, specified in the notice, to execute such works as may be necessary to make the house in all

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Town Planning, &c., Act, 1919, as amended by s. 10 of the Housing, &c., Act, 1923, requiring him as the alleged owner within the meaning of that section to execute certain specified works at the houses. The said works were necessary in order to make the houses reasonably fit for human habitation.

(xxv.) The notices were not complied with, and the Council themselves executed the works and thereby incurred expenses amounting to the sums respectively claimed by the three summonses.

(xxvi.) and (xxvii.) On December 30, 1925, the Council served on J. N. Watts as the owner of the three houses within the meaning of the said Acts three demands for payment

respects reasonably fit for human habitation: Provided" . . . .

"(2.) If the notice of the local authority is not complied with, the local authority may—

(*a*) at the expiration of the time specified in that notice . . . . do the work required to be done.

(3.) Any expenses incurred by the local authority under this section may be recovered in a court of summary jurisdiction, together with interest at a rate not exceeding five pounds per centum per annum from the date of service of a demand for the same till payment thereof from the owner" . . . .

"(5.) In this section 'owner' shall have the same meaning as in the Public Health Act, 1875."

Public Health Act, 1875: "Sect. 4. In this Act, if not inconsistent with the context, the following words and expressions have the meanings hereinafter respectively assigned to them; that is to say, ...

'Owner' means the person for the time being receiving the rack-rent of the lands or premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rackrent."

Sect. 28 of the Housing, Town Planning, &c., Act, 1919, remained in force until July 1, 1925, when it was repealed by the Housing Act, 1925: see s. 136, sub-s. 1, and s. 137, sub-s. 2, and replaced by s. 3 of that Act; but "nothing in this repeal shall affect any . . . . order . . . . made, notice given, or charge effected under any enactment hereby repealed, but any . . . . order . . . . notice, and charge shall have effect as if made, given, or effected under the corresponding provision of this Act and may be . . . . enforced accordingly."

Housing Act, 1925: "Sect. 3.—(10.) In this section 'owner' has the same meaning as in the Public Health Acts."

"Sect. 135. In this Act, unless the context otherwise requires—'Public Health Acts' mean as respects London, the Public Health (London) Act, 1891, and the Acts amending that Act, and elsewhere the Public Health Act, 1875, and the Acts amending that Act."

Sect. 141 of the Public Health (London) Act, 1891, contains a definition of "owner" which is identical with that in s. 4 of the Public Health Act, 1875.

of the three sums and interest as aforesaid. The demands were not satisfied, and on June 4, 1926, the Council summoned J. N. Watts for non-payment thereof.

The summonses were heard before the magistrate, Mr. J. B. Sandbach, K.C., on March 30, 1928. J. N. Watts contended that he was not the owner of the houses within the meaning of the Acts, but was at all times acting merely as solicitor to the widow and administratrix of the estate of E. J. H. Wallis and was receiving the balances in respect of costs owing to him as such solicitor. The Borough Council contended that at all material times the said J. N. Watts was the owner of the houses within the meaning of the Acts.

The magistrate held that J. N. Watts was the owner, but stated the case for the opinion of the Court, upon the question whether on the facts set out above he came to a correct determination.

The Divisional Court (Swift and Acton JJ.) (1) affirmed the decision of the magistrate.

J. N. Watts appealed.

Montgomery K.C. and *Randolph A. Glen* for the appellant.

Russell Gilbert (*The Hon. R. Stafford Cripps K.C.* with him) for the respondents.

SCRUTTON L.J. This is a case of some difficulty, and I am sorry to say there is a difference of opinion in the Court. The question arises under Acts passed, among other purposes, for improving the condition and repair of houses suitable for occupation by persons of the working classes. The Act of 1919 is the important one for the present purpose —the subsequent Acts do not seem very material to this case. By s. 28 of that Act, if a house otherwise suitable for occupation by persons of the working classes was not kept in a condition reasonably fit for human habitation, the local authority might serve a notice on the owner of the house requiring him within twenty-one days to execute such works as might be necessary to make the house in all respects reasonably fit for human habitation. There was also a provision

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that if the house was in such a condition that it could not without reconstruction be made fit for human habitation the owner might elect to close it, and then there would be no obligation upon him to execute work of repair or of reconstruction. But supposing there was no question of closing or reconstructing then, if the owner did not comply with the notice, the local authority might do the necessary work, and any expenses incurred by them could be recovered in a court of summary jurisdiction from the owner, and those expenses if not paid were made a charge upon the premises.

Then who is the owner? Parliament seems to have contemplated that it might be difficult for the local authority to find the owner; he might not be in the United Kingdom at all; and so a statutory definition of owner was provided, first, that which appears in s. 4 of the Public Health Act, 1875, and later that contained in s. 141 of the Public Health (London) Act, 1891, but as the two definitions are in identical terms it does not matter which Act is taken to define the word. It is defined as "the person for the time being receiving the rackrent of the lands or premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person." It seems to have been assumed that the agent paying the money claimed from him would have a legal right of indemnity against the owner; but no one seems to have thought that possibly the owner might be unable to repay the agent, and consequently it is clear that this definition may lead to hard cases. But it is not for us to legislate because we think that Parliament has used words which must give rise to hardship. Our business is to interpret the words used and not, under the guise of construing those words, to usurp the function of the Legislature.

Was the appellant, who has been charged with these expenses, receiving the rackrent of the lands as agent for any other person? The facts are carefully stated in the special case. Three small houses in a working-class neighbourhood belonged originally to Mr. Edward James Henry Wallis, who while he was alive employed Mr. G. R. Spicer, a builder, to collect

the rents of the houses. Mr. Wallis died in February, 1922, having apparently made two contradictory wills, by one of which he left two of the houses to his widow and the third to his son, and by the other disposed of them otherwise, but in a way not stated. Proceedings then took place in the Probate Division, in which the testator's son-in-law was the plaintiff. He propounded the second will. In these proceedings the appellant acted as solicitor for the widow. It is not stated whether any one acted as solicitor for the son; apparently the interests of the widow and the son were the same. The proceedings were ultimately settled on the terms that the three houses should be sold and that out of the proceeds the plaintiff's costs of the actions should be paid and the balance was to be divided and paid as to one-third to the son and as to two-thirds to the widow. On the death of Mr. Wallis the son-in-law had directed Mr. Spicer to continue collecting the rents. On February 23, 1922, the appellant very properly gave instructions to Mr. Spicer not to part with any of the rents but to hold them, as they would have to be accounted for to the person entitled to them when the Probate suit was disposed of. When that suit was settled Mr. Spicer, having apparently heard who were the persons entitled to the rents, communicated with the widow, who referred him to the appellant; and after that, when any sums were to be paid out of the rents, Mr. Spicer applied to the appellant for instructions and received instructions from the appellant, and paid or refrained from paying according to the instructions he received. Further, on the appellant's instructions Mr. Spicer paid to the appellant the net balance of the rents and rendered him an account of the rents collected. This went on for two or three years.

On these facts was the appellant receiving the rack rents of the lands as agent for any other person? Different minds take different views, and therefore I ought not to say the answer is clear. It is clear to me—but possibly what is clear to me is wrong—that the appellant giving instructions to Mr. Spicer, which are obeyed by Mr. Spicer, to make payments out of the rents and to pay the balance to him after making

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the authorized payments, is receiving the rackrents. It is true that he receives them on behalf of the widow and her son, but that is receiving them as agent; and in my view it is clear that he is receiving them as agent for another person. The magistrate has taken that view and the Divisional Court has affirmed it. I am not at all sure that it is not a question of fact. If it is, the magistrate has decided it. The reason for my doubt is that the House of Lords are not unanimous in opinion as to what is a question of fact and what is a question of law. (1) Some noble lords hold that, when a question arises upon a statute, the meaning of the statute is always a question of law; that, when the meaning has been ascertained, it is a question of law whether a particular instance comes within that meaning, and that, however simple the words of the statute may be, their meaning is always a question of law. Other noble lords take a different view, and hold that when plain words are used the only question is whether the particular instance comes within the plain words, and that this is a question of fact. But for Lord Wrenbury's views I should have been disposed to think that the question whether the appellant was receiving the rackrents as agent for another person was a question of fact; but whether that is a question of fact or of law, I think he was receiving the rackrents; clearly he was receiving for other persons—namely, the widow and her son—who were employing him. Therefore in my opinion he was receiving the rackrent of lands or premises as agent for another person. That is the view taken by the magistrate. In so far as it is a question of fact there is no appeal. It is the view taken by the Divisional Court, and it is the view I take. Consequently I think the appeal should be dismissed.

GREER L.J. In my judgment the appellant, a solicitor acting for the owners and giving instructions on their behalf to Mr. Spicer, who received the rent, as to how he should

(1) See *Herbert v. Samuel Fox & Co.* [1916] 1 A. C. 405; *Great Western Railway Co.* v. *Bater* [1922] 2 A. C. 12, 30; *Gas Lighting Improvement Co.* v. *Commissioners of Inland Revenue* [1923] A. C. 723, 728.

deal with the money he received as rent, was not the owner within the statutory definition. I begin this case by considering the question put to the Court by the learned magistrate: "The question on which the opinion of the Court is desired is whether upon the above stated facts I came to a correct determination of the question whether the appellant was or was not at all material times the 'owner' of the said three houses within the meaning of the said Acts, and the Court is asked to make such order in the matter as is deemed proper." In order to find the facts the Court must look, not at the final decision of the magistrate, but only at those facts which he says he has found; his final decision is not to be taken as one of the facts stated in the case.

The question is what is the proper interpretation of the definition of "owner." It matters not whether the definition is to be found in s. 4 of the Public Health Act, 1875, or in s. 141 of the Public Health (London) Act, 1891; the "owner" by whom the local authority is entitled to be paid is—(for the definition really defines and does not merely include)—"the person for the time being receiving the rackrent of the lands or premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rackrent." The person indicated is the person receiving the rackrent of the premises and, I think, receiving it from the tenant. The object of this definition seems to be, as Scrutton L.J. has said, to relieve the local authority of the burden of discovering the owner of the premises and to impose on them the easier task of finding out the person to whom the tenant pays his rent. That person is the only person whom the Legislature indicates as the "owner" for the purpose of this statute. If that person is a mere clerk or servant for some employer it may possibly be said that the employer is receiving the rent by the hand of his clerk or servant, and it may well be, though it is not necessary to decide this, that if any one appoints an agent to receive the rent on his behalf, the person appointing the agent is receiving the rent from the tenant. But this is not a case of that kind,

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because it is clear from the facts stated that Mr. Spicer was not the agent of the appellant but was the agent of the owners who were entitled to the rent. When Mr. Spicer received the rent he received it on behalf of the owners of the premises and had to account to them for it as money had and received to their use. He was under no duty to account to the appellant except upon the mandate of the owners, in which case by accounting to the appellant he would be accounting to the owners. It would strain the meaning of the Act to say that any intermediary, through whose hands the money may pass on its way from the actual receiver to the owner, is the "owner" within the meaning of the statute. In my view, as soon as the rent was paid to Mr. Spicer there was no more rent to be received by anybody; the rent had been paid and received; it had been received by Mr. Spicer on behalf of the owners; and the fact that by their instructions he paid it to them through the intermediate hand of their solicitor does not make the intermediary, who was in no sense the principal of Mr. Spicer but was only an agent giving instructions on behalf of the persons entitled, the "owner" within the definition of the Act. It is important to observe that when Mr. Spicer receives the rent from the tenants he does not hand over the money in specie, but pays it into his own bank and draws his own cheque when accounting for the money he has received on behalf of the owners of the property.

I desire to add that I do not think Swift J. was right in saying that, if the local authority were not entitled to succeed in this case, it would follow that there might be several persons receiving the rackrent within the meaning of the statute each of whom would therefore be liable to the local authority. In my opinion the statute does not produce that result. The person receiving the rackrent means the person originally receiving the rackrent from the tenant. Payment and receipt are correlative terms. The rent was paid when it was handed over to Mr. Spicer; it was received when it was handed over to Mr. Spicer, and there the matter ended so far as payment and receipt of rent are concerned. I differ from Scrutton L.J. with great hesitation, but in my opinion the Divisional Court

and the magistrate took a wrong view of the meaning of this statute and applied it to facts to which it is not applicable, and I think this appeal ought to be allowed.

SANKEY L.J. The question in the present case may be stated simply as follows: Did the appellant receive the rackrent as agent for the widow, the actual owner of the houses? Upon a true direction in law the answer to that question depends on the facts. On turning to the definition of "owner" it will be observed that it does not say that owner means the person for the time being receiving the rackrent from the tenant. The words "from the tenant," which are found in other statutes, do not appear in the statute we are considering. The wording is wide and the definition is intentionally comprehensive. Difficult questions are suggested as likely to arise in consequence, but in my view they appear less formidable when the true meaning of the words "as agent or trustee for any other person" is kept in mind. If a boy of fourteen years of age were sent by his father to collect weekly rents it would be hardly possible to say that the boy received the rents as agent or trustee for his father, so as to make him an owner within the meaning of the definition; and similarly in many other cases the facts will of their own force fall within or without the definition. How the case should be decided if persons entitled to the rackrent instructed their tenant to pay the rent to their bankers, I am not at present prepared to say. The question before us is: Did the appellant receive the rackrent as agent for the widow? To decide this question I look at the facts that during his lifetime the testator employed Mr. Spicer, a builder, to collect the rents; after the testator's death the son-in-law directed Spicer to continue collecting the rents, and he did so. Then, it is stated: "On or about December 15, 1922, the said G. R. Spicer paid the sum of 25*l.* to the appellant and by letter dated December 15, 1922, and signed over a two-penny stamp the appellant acknowledged this sum." The letter was written by the appellant to Spicer, who had in fact collected the sum on account of the rents and was remitting it to the appellant. At first sight I thought

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there might be a difference between the positions of the appellant and Spicer respectively; that if the widow had to sue Spicer for the rent he had collected she would ask for an account of the rent, but that if she had to sue the appellant she would not ask for rent eo nomine but generally for money had and received for her use. But in the face of that letter of December 15, 1922, I think it is very difficult to say that the appellant did not receive the rackrent as agent for the widow. I regard that letter as tantamount to an acknowledgment of a cheque for 25*l.* on account of rent, and an admission that the amount was received on account of rent by one who was receiving it as agent for the widow.

In these circumstances I think the magistrate directed himself rightly on the question of law and that there was evidence on which he could find, and on which he was right in finding, that the appellant did receive the rackrent as agent for the widow, and that therefore his decision and the decision of the Divisional Court were correct and that this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Edmond O'Connor & Co.*
Solicitor for respondents: *J. Poole.*

W. H. G.

ATTORNEY-GENERAL *v.* PUBLIC TRUSTEE, ADOLPH TUCK AND ANOTHER.

1929
Jan. 16.

Revenue—Estate Duty—Will—Undivided Share of Land—Residuary Gift—Trust for Sale—Statutory Trusts—Real or Personal Estate—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 6, *sub-ss.* 2, 6 & 7—*Finance Act*, 1896 (59 & 60 *Vict. c.* 28), *s.* 18—*Finance Act*, 1919 (9 & 10 *Geo.* 5, *c.* 32), *s.* 30—*Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *s.* 16, *sub-s.* 4, *ss.* 34 & 39, *sub-s.* 4, *s.* 205, *sub-s.* 1 (*ix.*), *Sch. I., Part IV.*

Immediately before January 1, 1926, A. and his brother were entitled to freehold property for an estate in fee simple as tenants in common. On that day, by the Law of Property Act, 1925, s. 34, and Sch. I., Part IV., cl. 1, sub-cl. 2, tenancies in common were abolished, and the entirety of the property became vested in A. and his brother on the statutory trusts defined by s. 35 of the Act. On July 3, 1926, A. died, having by his will left his real estate and residuary personal estate to his executors and trustees on trust for sale. The executors claimed that for purposes of Inland Revenue A.'s moiety of the proceeds of sale of the above freehold property was real estate, and that estate duty was payable thereon by instalments as upon real estate under the Finance Act, 1894, s. 6, sub-s. 8.

An information was filed by the Attorney-General claiming that, as a result of the Law of Property Act, 1925, the property in question had become personal estate and that estate duty was payable thereon by the executors immediately:—

Held, that the Law of Property Act, 1925, had effected no change in the incidence of duty, which was payable as upon real estate.

In re Mellish and *In re Wheeler* (post, p. 81) followed.

INFORMATION filed by the Attorney-General on behalf of His Majesty.

The testator, Sir Adolph Tuck, by his will dated October 28, 1912, after appointing the defendants to be executors and trustees of his will and after sundry dispositions not here material, gave, devised and bequeathed all his real estate and his residuary personal estate to his trustees upon trust to sell and convert into money all such parts as should not consist of money, and to hold all such moneys and his real and residuary personal estate until converted upon the trusts therein expressed.

The testator died on July 3, 1926, and his will was proved by the defendants on September 17, 1926. Immediately before January 1, 1926, when the Law of Property Act, 1925, came into force, the testator and his brother Gustave were absolutely entitled to certain freehold property in the City

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of London for an estate in fee simple in possession as tenants in common in equal shares. By virtue of the Law of Property Act, 1925, ss. 34 and 39, sub-s. 4, and of Part IV. of the First Schedule tenancies in common and undivided shares in land were abolished and the entirety of the property became by cl. 1, sub-cl. 2, of Part IV. of the First Schedule vested in the testator and his brother Gustave as joint tenants upon the statutory trusts defined by s. 35 of the Act; that is to say, upon trust for sale with powers of postponement and interim management and upon trust to hold the proceeds of the sale and the rents and profits until sale for the testator and his brother in equal shares (see as to this Law of Property Act, 1925, ss. 25, 28 and 35).

In consequence of the Act the testator's beneficial interest in the property ceased to consist of a share in the land and became a share in the benefit of the statutory trusts for sale and powers subsidiary thereto, and this interest was included in the residuary devise and bequest contained in the will.

The testator's moiety of the net proceeds of sale of the property in question was included by the defendants in the Inland Revenue affidavit leading to probate of the will as real estate, the defendants contending that the moiety ought to be treated as real estate for estate duty purposes notwithstanding the trust for sale.

The defendants contended that the estate duty payable in respect of this moiety was "duty due upon an account of real property" within s. 6, sub-s. 8, of the Finance Act, 1894, and that under that sub-section as amended by the Finance Act, 1896, s. 18, and the Finance Act, 1919, s. 30, they were entitled to pay the same by instalments extending over a period of eight years as therein provided with interest at 4 per cent. from the date of the first instalment, that is, on the expiration of twelve months from the testator's death.

For the Crown it was contended that the testator's moiety of the proceeds of sale of the property ought, for the purposes of estate duty, to be treated as personal estate, with the result that under the Finance Act, 1894, s. 6, sub-ss. 2, 6

and 7 (as amended by the Finance Act, 1896, s. 18, and the Finance Act, 1919, s. 30), the estate duty payable thereon became due immediately upon delivery of the Inland Revenue affidavit with interest at 4 per cent. per annum from the testator's death.

The question between the Attorney-General and the defendants depended upon the construction and effect of the Law of Property Act, 1925, s. 16, and particularly s. 16, sub-s. 4, taken in conjunction with s. 205, sub-s. 1 (ix.), of the same Act. For the Crown it was contended that the operation of s. 16, sub-s. 4, was confined to interests which passed as land on a death taking place after the commencement of the Act, and did not affect property consisting of undivided shares in land which by the Act were abolished and replaced by interests which were neither land within the meaning of the Act nor real property within the meaning of the Finance Act, 1894.

The Attorney-General prayed for a declaration that the testator's moiety of the net proceeds of sale of the property in question was personal estate and passed to the testator's executors as such within the meaning of the Finance Act, 1894, and that the defendants as such executors were bound upon delivery of the Inland Revenue affidavit to pay the whole of the estate duty payable on such moiety together with interest at 4 per cent. per annum from the death of the testator, and that the Commissioners of Inland Revenue were entitled to retain the moneys paid by the executors accordingly.

Sir Thomas Inskip A.-G. and *J. H. Stamp* for the Crown. Tenancies in common were abolished by the Law of Property Act, 1925, s. 34 and s. 39, sub-s. 4, together with Sch. I., Part IV. Since January 1, 1926, when the Act came into force, the only interests in land which can be created are those set out in s. 1, sub-s. 2 (*a*), of that Act. All other estates in land take effect as equitable interests; s. 1, sub-s. 3. These are defined in s. 205, sub-s. 1 (x.). By s. 34, sub-s. 1, an undivided share in land can only be created as provided

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by the Settled Land Act, 1925, " or as hereinafter mentioned." Here the entirety of the property at the time of the testator's death was vested in him and his brother as joint tenants upon " the statutory trusts " declared in s. 35 of the Act. This is clear from s. 34 and Sch. I., Part IV., cl. 1, sub-cl. 2, of the Act. In order to effect the transition from the law as it was prior to the Law of Property Act, 1922, provision is made by s. 39 of the Act of 1925 that Sch. I. of that Act shall have effect for converting legal into equitable estates and for subjecting land in undivided shares to trusts for sale. The general effect of the Law of Property Act, 1925, is to convert realty into personalty.

Land held on the statutory trusts is to be held upon trust for sale (s. 35), and among other purposes this takes effect for the purpose of taxation as personalty. Apart from s. 16, sub-s. 4, of the Act (1) no doubt could arise. But this claim does not involve an alteration in duty or a new duty. It is really an alteration in the time of payment. The change is from real to personal estate. The testator's moiety consisted, according to the Act of 1925, of " an equitable interest in the proceeds of sale—namely, such an interest as might be requisite for giving effect to his rights as a person interested in the land." We adopt these words from the judgment of Clauson J. in *In re Price.* (2)

It must, however, be admitted that the decisions of Eve J. in *In re Mellish* (3) and of Tomlin J. in *In re Wheeler* (4) are against us.

[MR. JUSTICE ROWLATT (after the notes of these two cases had been read to him): I must follow those authorities, Mr. Attorney.]

Sir Thomas Inskip A.-G. I respectfully think that your lordship is bound to follow them, but I thought it right to present the argument.

(1) Law of Property Act, 1925, s. 16, sub-s. 4: " Nothing in this Act shall alter any duty payable in respect of land, or impose any new duty thereon, or affect the remedies of the Commissioners of Inland Revenue against any person other than a purchaser or person deriving title under him."

(2) [1928] Ch. 579, 589.

(3) Post, p. 82.

(4) [1928] W. N. 225, and post, p. 81.

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Latter K.C. and *Andrewes Uthwatt* for the defendants were not called on.

ROWLATT J. I will say no more than that the case is covered by *In re Mellish* (1) and *In re Wheeler* (2), and that therefore the information will be dismissed.

Solicitors for the Crown: *Solicitor of Inland Revenue.*
Solicitors for defendants: *Morley, Shirreff & Co.*

F. P. F.

NOTE.

(Reprinted from 1928 W. N. 225.)

Tomlin J. Ch. Div. 1928. July 13, 20.

In re WHEELER. JAMESON *v.* COTTER.

[1928. W. 1714.]

Will—Real estate—Seisin of testator—Undivided moiety of land—Devise of fee simple—Death of testator after January 1, 1926*—Payment of estate duty—Testamentary expense—Payment by executors out of personal estate—Undivided shares in land—Land held on statutory trusts—Estate duty, how borne since January* 1, 1926*—Ademption—Repayment by devisee—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 16, *sub-ss.* 4, 5.

Originating Summons.

By his will dated June 24, 1925, Alfred Llewelyn Wheeler (hereinafter called "the testator") appointed the plaintiffs, Henry R. Jameson and Graham Blunt, executors and trustees thereof, and also trustees for the purposes of the Settled Land Acts, 1882 to 1890, and the Conveyancing Act, 1881, s. 42. After various bequests and legacies, the testator devised all his real estate and undivided shares of real estate in the county of York, subject to the payment thereout of a yearly rent charge to each of the defendants, Dame Ethel L. Cotter and Mrs. Violet A. Jameson (his two daughters), to his grandson, the defendant, Sir Delaval James A. Cotter, Bart. (who was an infant), and his assigns during his life, with remainders over. And as to all the residue of his real and personal estate, the testator devised and bequeathed the same to his trustees upon trust to sell and convert as therein mentioned, and to pay thereout his funeral and testamentary expenses, debts and legacies. The testator further directed that his trustees should invest the moneys arising from any sale of his real and personal estate as therein mentioned, and should stand possessed of one moiety of the said trust premises in trust to pay the income thereof to his daughter, the defendant, Dame Ethel L. Cotter, during her life for her separate use, and after her death should hold

(1) Post, p. 82. (2) Note on this page.

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the capital and future income thereof in trust for her children or remoter issue as therein mentioned. As to the other moiety, the testator made a similar provision in favour of his daughter, the defendant, Mrs. Violet A. Jameson, and in case the trusts thereinbefore declared concerning either moiety should fail, he directed that such moiety should go and accrue by way of addition to the other moiety, and be held upon the trusts declared concerning the same. There were other provisions in the will not material for the purposes of this report. The testator made a codicil to his will dated September 3, 1927, whereby he gave certain legacies and confirmed his will. The testator died on September 27, 1927, and probate was granted to his executors, the two plaintiffs, on November 25, 1927, by the Principal Probate Registry. Prior to January 1, 1926, the testator and another were seised in unencumbered fee simple in undivided moieties of the real estate in the county of York, the entirety of which on the last-mentioned day became vested in them as joint tenants upon the statutory trusts by virtue of the provisions of the Law of Property Act, 1925, Sch. I., Part IV., para. 1, sub-para. 2. The testator's estate was very considerable, the above-mentioned undivided moiety alone being valued at over 40,000*l.*

On the affidavit to lead to probate in respect of the testator's estate being submitted to the Inland Revenue authorities, the testator's interest in the undivided moiety of the real estate in the county of York was treated as personal estate by reason of the notional conversion by virtue of the statutory trust for sale on which the estate was held at the testator's death under the Law of Property Act, 1925, Sch. I., Part IV., para. 1, sub-para. 2. Estate duty was accordingly paid on it in that character out of the testator's residuary estate. The sum so paid amounted to 9349*l.* 4*s.* 11*d.*

Doubts having arisen whether this view was correct, and the plaintiffs being desirous of ascertaining how the estate duty ought ultimately to be borne as between the persons entitled to the testator's interest in the land or the proceeds of sale thereof, and the persons entitled to the residuary estate of the testator, an originating summons was issued for the determination (inter alia) of the following question: (1.) Whether the amount of the estate duty paid by the plaintiffs as such executors, as aforesaid, as a testamentary expense in respect of the testator's undivided moiety of the real estate in the county of York was repayable by the defendant, Sir Delaval James A. Cotter, and, if so, whether he might at his option repay it with interest at 4 per cent. per annum in accordance with the Finance Act, 1894, s. 9, sub-s. 4; the Finance Act, 1896, s. 18; and the Finance Act, 1919, s. 30.

On the matter being adjourned into court, and shortly after the argument for the two defendants, Dame Ethel L. Cotter and Mrs. Violet A. Jameson, had been opened, it was stated that a similar point regarding undivided shares and the incidence of estate duty had been decided by Eve J. in July, 1927, in an unreported case intituled *In re Henry Mellish. Clark* v. *Buchannan* [1927 M. 1674]. The summons was accordingly ordered to stand over for that case to be considered on the point.

In *In re Mellish* (supra) it appeared that one Henry Mellish, who died on February 2, 1927, by his will dated January 18, 1923, after appointing the plaintiff and one of the defendants, C. J. Buchannan, executors and trustees thereof, devised all his share and interest in an estate known as the Rushall Estate, in the county of Stafford, to the defendant, C. J. Buchannan, in fee simple. The testator's interest at the time of his death in the Rushall Estate

was as follows—namely, a one-ninth, or 12-108, undivided share in the legal estate in fee simple, and a one-ninth share in the net proceeds of sale of another third. Estate duty having been paid out of the personal estate, the question arose whether the testator's interest was not totally or partially adeemed by the Law of Property Act, 1925, or how affected thereby, and whether C. J. Buchannan (a defendant to the summons) should by virtue of the Finance Act, 1894, and amending Acts, including the Law of Property Act, 1925, s. 16, recoup to the testator's personal estate all sums which had been paid by way of estate duty in respect of the devise aforesaid. It was held by Eve J., by an order dated July 1, 1927, that the devise of the testator's share or interest in the Rushall Estate was not adeemed in whole or in part by the Law of Property Act, 1925, and that the devise took effect as a bequest of all the testator's interest therein and the proceeds of sale thereof, and that by virtue of the Law of Property Act, 1925, s. 16, sub-ss. 4 and 5, the share of C. J. Buchannan to arise from the sale of the one-ninth share, to which the testator was originally entitled in fee simple, was charged with the amount of the estate duty; and, further, that the amount of the estate duty paid out of the testator's personal estate in respect of the principal value of the said one-ninth share in the said estate so devised to C. J. Buchannan was repayable by him to the executors by instalments, with interest at 4 per cent. per annum, in accordance with the Finance Act, 1894, s. 9, sub-s. 4; the Finance Act, 1896, s. 18; and the Finance Act, 1919, s. 30. This case was accordingly brought to the notice of the Court for consideration.

W. A. Peck for the summons.

J. W. F. Beaumont for the infant defendant, Sir Delaval James A. Cotter.

F. Baden Fuller for the defendants, Dame Ethel L. Cotter and Mrs. Violet A. Jameson.

TOMLIN J. The short point here is, where an undivided share in land has become subject to a statutory trust, what is the effect in regard to estate duty? In this particular case, the testator, being the owner of undivided shares in land, made a will before the Law of Property Act, 1925, came into force, by which he devised them to the defendant, who is an infant. In due course he survived the date when the Act came into force, and subsequently made a codicil, in which he did not alter the provisions of his will with regard to his undivided shares, but confirmed them. Then he died, and the question is, what is the effect, so far as ademption and duty are concerned, in regard to that disposition? When this matter first came before me I was told that there was an unreported case that had been decided by Eve J. dealing with the same point, and I therefore directed this case to stand over in order that it might be ascertained what conclusion the learned judge had come to upon points which I was told were similar to those now raised before me. I have seen the summons, evidence and order made in that case, the name of which is *In re Henry Mellish. Clark* v. *Buchannan and Others* (supra). It seems to me that it would be impossible in the case now before the Court to come to a conclusion either that there had been ademption or that there had been any change in the burden of duty without, at any rate, coming into conflict with the views which have been expressed by Eve J. in the

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case of *In re Mellish* (supra). It seems to me clear that Eve J., in circumstances which were sufficiently similar to the circumstances in the present case to make it an authority of importance, directly decided the two points. I have not had the advantage, of course, of reading any reasoned judgment of the learned judge, because no shorthand note has been produced; but such acquaintance as I have with the Law of Property Act, 1925, enables me to see that there are, at any rate, many reasons which might be advanced for supporting the conclusions at which Eve J. arrived. Among others, so far as the question of incidence of duty is concerned, it seems to me that a forcible argument may be based upon the Law of Property Act, 1925, s. 16, sub-s. 4, where it may well be that "land" includes, and is required by the context to include, an "undivided share in land," and that that sub-section alone is enough to secure that there is no change in the incidence of duty. But, however that may be in a matter of this kind, it is not only proper, and in accordance with ordinary practice, that one judge should follow the decisions of another judge of co-ordinate jurisdiction, but it is important to do so on matters of title and conveyancing under these Acts in order that, at any rate, the advantage of uniformity may be secured, whatever may be the other difficulties to be encountered. The answer to question one will therefore be in the affirmative, the repayment to the executors being by instalments at the option of the defendant.

Solicitors: *Blunt, Torr & Co.*

A. R. T.

[We regret that, after inquiry in several quarters, we have not been able to find any materials for a report of the reasons given by Eve J. in the case of *In re Mellish* when the question was first raised.—F. P.]

PERRIN *v.* DICKSON (Inspector of Taxes).

1929
March 13.

Revenue—Income Tax—Annuity—Insurance—Educational Policy—Capital Repayment with or without Interest—Annual Instalments—Income Tax Act, 1918 (8 *& 9 Geo.* 5, *c.* 40), *Sch. D.*

By a policy of assurance effected by the appellant with the Clergy Mutual Assurance Society to provide for his son's education the society, in consideration of six premiums of 90*l.* each, paid annually between 1912 and 1917, agreed to pay to him an annuity of 100*l.* each year for seven years as from September 29, 1920. If the son should die, the premiums were to be repaid to the appellant or his representatives without interest. The appellant duly received the annual amounts paid by the society for the seven years from 1920 to 1926, and assessments were made on him in respect of the full amount of these sums for income tax as on an annuity for these respective years under Sch. D. The Special Commissioners confirmed the assessments, and the appeal was from this decision:—

Held, that, as the principal money remained intact, the annua payments by the society did not constitute an annuity under the Income Tax Acts, and that income tax was only payable upon such part of them as consisted of interest.

Case stated under Income Tax Act, 1918, s. 149, by Commissioners for Special Purposes of Income Tax Acts.

The material facts, taken from the case stated, were as follows: At a meeting of the Commissioners on April 16, 1928, the Right Rev. W. W. Perrin appealed against assessments under Sch. D to income tax in the sum of 150*l.* for each of the years ending April 5, 1922 to 1926 inclusive.

By a policy of assurance dated September 18, 1912, between the appellant and the Clergy Mutual Assurance Society, after reciting that the appellant desired to effect an assurance with the society for an annuity for and on behalf of his son, Michael Perrin, it was agreed that in consideration of premiums of 90*l.* 15*s.* 10*d.*, payable yearly on September 18, from 1912 to 1917 inclusive, the society would pay to the guardian of Michael Perrin an annuity of 100*l.* for seven years. The first payment was to be made on September 19, 1920, and on every subsequent September 19 up to and including September 19, 1926, if Michael Perrin should live so long. It was further provided by the policy that in the event of the death of Michael Perrin the total amount of the

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premiums paid in respect of the assurance, after deduction of any amount that might have been received by way of annuity, but without interest, should be paid to the appellant or his representatives or assigns. A policy in similar terms, dated September 12, 1912, was entered into by the appellant with the society for an annuity for his daughter, Margaret Perrin, the premium being 33*l.* 7*s.* 6*d.* for six years, 1912–1917, and the annuity 50*l.* for five years from 1920 to 1924.

Evidence was given before the Commissioners that the sums payable were calculated so as to return to the appellant, in the event of the nominee living, the amount which the appellant had paid to the society, with compound interest at 3 per cent.

The appellant, as guardian of Michael Perrin and Margaret Perrin, duly received the sums payable under the two policies, and the assessments under appeal were made on him in respect of the sums which he so received.

The appellant contended that the sums paid to him under and by virtue of the policies were not annuities or other annual sums taxable under the Income Tax Acts; that they were capital and represented repayments to him of sums deposited by him with the society, which, in the events which happened, became repayable by the society with interest by instalments on certain specified dates; that the sums were not and did not become annuities because they were so described in the policies; that in substance and in fact the policies provided for payment to him of two capital sums of 700*l.* and 250*l.* respectively or, in certain events, of lesser sums by equal yearly instalments; and that the assessments should be discharged. Alternatively that only such part of the sums assessed as might be found to represent interest on the premiums paid by the appellant was liable to income tax; and that the assessments should be reduced.

The respondent contended that the sums paid to the appellant under and by virtue of the policies were annuities and were assessable in his hands under Sch. D; and that the assessments were correct and should be confirmed.

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The Special Commissioners held that the payments by the society to the appellant were annuities, and as such were liable to income tax, and they confirmed the assessments.

At the request of the appellant they stated this case for the opinion of the Court.

Latter K.C. and *Cyril King* for the appellant. The principle laid down in *Foley* v. *Fletcher* (1) by Bramwell and Watson B.B. as to the meaning of an annuity for purposes of income tax still holds good, that it is only an annuity if the capital has ceased to exist. Where the capital continues in being and is ultimately returned with or without interest, as is the case here, income tax is only payable on that interest. In *Scoble* v. *Secretary of State in Council of India* (2) the State purchased a railway, paying "an annuity" for a term of years. The annuity represented as to part instalments of purchase money, and as to part, interest on the unpaid purchase money. Income tax was held to be payable only on that part which represented interest. The fact that the purchase of the so-called annuity is carried out by agreement, and that no antecedent debt exists, makes no difference: *East Indian Ry. Co.* v. *Secretary of State in Council of India.* (3) In *East Indian Ry. Co.* v. *Secretary of State in Council of India* (4) the facts were different and deduction of the whole tax was allowed. In the same way the transaction here is not within the definition of an annuity at all, although it is so described in the policy; it is a deposit of money on terms that the money shall be returned with interest at 3 per cent., if the nominee shall so long live.

Sir Boyd Merriman S.-G. and *R. P. Hills* for the Crown. Watson B's definition of an annuity in *Foley* v. *Fletcher* (1) is not comprehensive. For in the term "annuity" there must be included the case where the annual sum ceases in certain events to be payable. The consideration for this

(1) (1858) 3 H. & N. 769.

(2) [1903] 1 K. B. 494; [1903] A.C. 299. [The statutory designation is now "the Secretary of State in Council." See the Government of India Act, 1915, *passim*, esp. s. 32—F. P.]

(3) [1905] 2 K. B. 413.

(4) (1924) 40 T. L. R. 241.

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part of the agreement is that the annuitant forgoes part of the annuity in certain events, and receives instead a return of his capital. So long as the original bargain stands, it remains an annuity such as was discussed by Stirling L.J. in *Scoble* v. *Secretary of State in Council of India*. (1) The mere fact that capital is not sunk but may in certain events be returned does not prevent the payment from being an "annuity." We rely on the judgment of Lord Blackburn in *Coltness Iron Co.* v. *Black* (2) on this point. It matters not whether the period for payment of the annuity is fixed or not, nor does it matter whether the capital is in certain events to be returned or not. These are ancillary provisions which do not affect the primary bargain for annual payment: *Chadwick* v. *Pearl Life Insurance Co.* (3) In all cases in which this question has been considered, the Court has been careful not to trespass upon the rule that annuities proper whether terminable or not are liable to income tax: in *Scoble's* case (4) there was not really an annuity, but the liquidation of an antecedent debt by payment of instalments.

Latter K.C. in reply.

ROWLATT J. [after stating the facts, continued:] The substance of the present transaction is that the appellant does not really adventure his capital at all. Under the terms of the policy the capital is in any event to be returned to him. The insurance risk involved is the risk whether the son, who is the nominee under the policy, will survive the education period or not. If he survives, the society enjoys the use of the money and repays it with compound interest at 3 per cent. in equal annual instalments. If not, then their obligation is to repay it without interest. The son, in this case, did survive, and the sum of 100*l.* a year for six years was duly paid by the society to the appellant. The question is whether these payments constituted an annuity liable to income tax within the Income Tax Acts. In these cases the argument always goes back to Watson B.'s statement in *Foley* v.

(1) [1903] 1 K. B. 494, 504.
(2) (1881) 6 App. Cas. 315, 337.
(3) [1905] 2 K. B. 507.
(4) See note (2) ante, p. 87.

Fletcher (1) that an annuity means "where an income is purchased with a sum of money, and the capital has gone and has ceased to exist, the principal having been converted into an annuity." That definition has never been seriously questioned, and is, I think, still accurate. But the difficulty arises when it is sought to apply it. Before the decision of *Secretary of State in Council* v. *Scoble* (2) it was generally thought that this definition was satisfied if capital were expended and returned in a series of payments of equal amount, including both capital and income indistinguishably. But in that case it was laid down that this view was incorrect. The Secretary of State, acting under his powers, there elected to purchase the full value of shares or capital stock of a railway company by paying, instead of a gross sum, an "annuity" for a term of years, the rate of interest being determined in a specified way. It was held that the annuity represented payment of the debt by instalments with interest in consideration of postponing payment. The instalments were annual payments of a constant amount, and the circumstance that each consisted of a different proportion of capital and income did not matter in the least. In *Chadwick* v. *Pearl Life Insurance Co.* (3) Walton J. points out that it may be "very difficult to distinguish between an agreement to pay a debt by instalments, and an agreement for good consideration to make certain annual payments for a fixed number of years." The mere circumstance of a pre-existing debt is not the test, but whether or not the principal sum is liquidated or not. If it is liquidated, the annual payments made in consideration of the debt constitute an annuity. If the principal sum is not liquidated, but continues to exist and is repaid in annual instalments, the repayment does not constitute an annuity. In *Chadwick* v. *Pearl Life Insurance Co.* (3) the annual payments were not a principal sum at all, but were paid and received as income. Here, on the contrary, the position is not so much that the principal was

(1) 3 H. & N. 769; 28 L. J. (Ex.) 100.

(2) [1903] 1 K. B. 494; [1903] A. C. 299.

(3) [1905] 2 K. B. 507, 514.

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repaid by means of the annuities as that it was never parted with. In the case of a life annuity the principal sum is of necessity parted with and disappears. But here the principal is never lost sight of. It is always there and is repaid, in certain events without interest, in other events with interest.

The Solicitor-General has argued that an annuity chargeable with income tax exists even if a sum is paid in the nature of salvage. But this is more than mere salvage, it is a simple return of capital to the appellant by the society. In my opinion this appeal must succeed, and the case must go back to the Commissioners, in order to decide what portions of these payments consist of interest, on which alone income tax is payable.

Appeal allowed.

Solicitors for appellant: *Druces & Attlee.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

F. P. F.

PATTERSON *v.* ROBINSON.

1929
April 9.

Merchant Shipping—Seamen—Neglect to Work—Complaint—Official Log-book—Evidence—No Entry of Offence—Jurisdiction to hear Complaint—Discretion—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 228, 239, 240.

By the Merchant Shipping Act, 1894, s. 228, in the case of certain offences by seamen of desertion or absence without leave or against discipline or any act of misconduct for which the offender's agreement imposes a fine, an entry of the offence (para. (*a*)) "shall be made in the official log-book and signed by the master and also by the mate or one of the crew," and para. (*d*)) "in any subsequent legal proceedings the entries by the section required shall, if practicable, be produced or proven, and in default of that production or proof the Court hearing the case may, in their discretion, refuse to receive evidence of the offence or act of misconduct."

A complaint was made before justices by the master of a British ship against six seamen for continuing to neglect duty, contrary to s. 225, sub-s. 1 (*e*), of the Act. No entry of the offence had been made in the official log-book, and the justices dismissed the complaint on this ground for want of jurisdiction :—

Held, that the making of the entry in the official log-book was not a condition precedent to the hearing of the complaint. Even where no entry of an offence has been made, and there has consequently been default under the section, the Court is not without jurisdiction to proceed. The effect of s. 228 (*d*) is to confer on the Court in such a case a discretion either to receive other evidence or to refuse to do so and dismiss the complaint.

CASE stated by justices for the county borough of South Shields.

At a Court of summary jurisdiction sitting at South Shields on October 9, 1928, a complaint was preferred by the appellant, Patterson, against the respondent, Robinson, and five others, in that between July 5, 1928, and September 13, 1928, on board the British ship *Gretavale*, then on the high seas, and being duly engaged to serve on board that vessel, they did unlawfully combine together to neglect duty contrary to the Merchant Shipping Act, 1894, s. 225, sub-s. 1 (*e*). The facts in the case stated, so far as material, were as follows :—

The offence complained of consisted of a continuous combination on the part of the respondents to neglect duty in that from July 5 to September 12, 1928, the respondents, as firemen on board the steamship *Gretavale* on a voyage

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from Colombo to the United Kingdom, acting in concert, refused and neglected to do a fair and reasonable amount of work during their on-duty periods with the object of compelling the appellant to pay them overtime wages for doing work during their off-duty periods. The appellant stated that in view of the long period over which this course of conduct continued he had not made any entry in the official log-book of the vessel in respect thereof.

Before any evidence was called on behalf of the appellant an objection was taken by the solicitor acting for and on behalf of the respondents that the entry of the alleged offence was required to be made by the appellant in the official log-book of the said vessel by virtue of the Merchant Shipping Act, 1894, ss. 228, 239 and 240. (1)

(1) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 225: "If a seaman lawfully engaged . . . . commits any of the following offences, in this Act referred to as offences against discipline, he shall be liable to be punished summarily as follows:— (*e*) If he combines with any of the crew to disobey lawful commands, or to neglect duty, or to impede the navigation of the ship or the progress of the voyage, he shall be liable to imprisonment for a period not exceeding twelve weeks."

Sect. 228: "If any offence, within the meaning of this Act, of desertion or absence without leave or against discipline is committed, or if any act of misconduct is committed for which the offender's agreement imposes a fine and it is intended to enforce the fine, (*a*) an entry of the offence or act shall be made in the official log-book, and signed by the master and also by the mate or one of the crew; and (*b*) the offender, if still in the ship, shall before the next subsequent arrival of the ship at any port, or if she is at the time in port before her departure therefrom, either be furnished with a copy of the entry or have the same read over distinctly and audibly to him, and may thereupon make such reply thereto as he thinks fit; and (*c*) a statement of a copy of the entry having been so furnished, or of the entry having been so read over, and, in either case, the reply (if any) made by the offender, shall likewise be entered and signed in manner aforesaid; and (*d*) in any subsequent legal proceeding the entries by this section required shall, if practicable, be produced or proved, and in default of that production or proof the Court hearing the case may, in their discretion, refuse to receive evidence of the offence or act of misconduct."

Sect. 239, sub-s. 1: "An official log shall be kept in every ship (except ships employed exclusively in trading between ports on the coasts of Scotland) in the appropriate form for that ship approved by the Board of Trade. Sub-ss. 2 and 3: . . . . Sub-s. 4: An entry required by this Act in an official log-book shall be made as soon as possible after the occurrence to which it relates, and if not made on the same day as that occurrence

For the appellant it was contended: (*a*) that the entry of the offence in the official log-book of the vessel was not, as contended by the respondents, a condition precedent to proceedings against the respondents under the Merchant Shipping Act, 1894, s. 225 (*e*); (*b*) that, even in cases where there is no entry in the official log-book at all, the Court hearing the case has by virtue of the Merchant Shipping Act, 1894, s. 228, a discretion to receive evidence of the alleged offence; or, alternatively, (*c*) that, as the nature of the alleged offence consisted of a course of conduct extending over a period of more than two months, which amounted to a continuing combination to neglect duty, and did not consist of isolated occurrences on particular days, it was not practicable to enter the alleged offence in the official log-book of the vessel or to prove or produce any entry relating thereto, and accordingly the Court had by virtue of s. 228 a discretion to receive evidence of the alleged offence.

For the respondents it was contended that as the entry of the alleged offence in the official log-book of the vessel had not been made as required by ss. 228, 239 and 240 of the Merchant Shipping Act, 1894, and as this was a condition precedent to any proceedings against the respondents for the alleged offence, the Court had no jurisdiction to hear the complaint, and that the complaint should be dismissed. The justices being of opinion that the contention of the

shall be made and dated so as to show the date of the occurrence and of the entry respecting it; and if made in respect of an occurrence happening before the arrival of the ship at her final port of discharge shall not be made more than twenty-four hours after that arrival."

Sect. 240: "The master of a ship for which an official log is required shall enter or cause to be entered in the official log-book the following matters (that is to say). Sub-s. 1: .... Sub-s. 2: Every offence committed by a member of his crew for which it is intended to prosecute, or to enforce a forfeiture, or to exact a fine, together with such statement concerning the copy or reading over of that entry, and concerning the reply (if any) made to the charge, as is by this Act required."

Sect. 241: "If an official log-book is not kept in the manner required by this Act, or if an entry directed by this Act to be made therein is not made at the time and in the manner directed by this Act, the master shall for each offence be liable to the specific fine in this Act mentioned in respect thereof, or where there is no such specific fine, to a fine not exceeding five pounds."

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respondents was a good objection, and that they had no jurisdiction to hear the complaint, dismissed it. At the request of the appellant they stated this case for the opinion of the Court, the question being whether, upon the above statement of facts, they came to a correct determination in law.

W. L. McNair for the appellant. The absence of an entry in the official log-book which is required by the Merchant Shipping Act, 1894, s. 228, does not take the case out of the jurisdiction of the justices. It gives them a discretion whether or no they will proceed with the case. The section is intended for the protection of seamen. It provides (sub-s. (*d*)) that an entry of the offence shall be produced, "if practicable," and that in default the justices may refuse to receive other evidence. This part of the section, it is submitted, applies even where no entry has been made. It enables the justices to refuse other evidence, if they so decide, but it does not take away their jurisdiction if they decide to hear other evidence. Even if the section only applies where an entry has been made, but cannot be produced, there is no section of the Act which takes away the jurisdiction of the justices if no entry is made. They could have refused to proceed with the case on the ground that the best evidence had not been produced, but they did not do this. An entry in the log-book is also required by s. 240 of this Act, and a penalty is imposed by s. 241 for default in this respect on behalf of the master, but these sections do not take away the discretion of the justices.

[AVORY J. What would happen if the offending seamen were to overpower the officers and prevent the entry in the log-book being made ?]

There other evidence must be admissible, or the main purpose of the Act would be defeated. The justices have a discretion in all cases where the entry in the log-book cannot be produced, whatever the reason may be.

The respondents did not appear and were not represented.

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LORD HEWART C.J. [after referring to the case stated and reading the material sections of the Merchant Shipping Act, 1894, continued:] It did not at first appear to me that s. 228 (*d*) governs a case in which no entry at all is made in the log-book, and where it is therefore impracticable on that ground to produce the entry in evidence. But on consideration I think that the words of the section are sufficiently wide to cover such a case. I am helped in coming to this conclusion by the form of this part of the enactment. Its provisions give power to the justices not so much to receive the evidence of the log-book entry, which otherwise they might not have received, but rather to refuse to receive other evidence. That is to say, apart from the power conferred by the Act, they are expected to receive and would naturally receive other evidence. The Act goes out of its way to make this entry in the official log-book admissible. But it does not make it the only evidence, and it provides that where the best evidence cannot be produced the justices may refuse to receive any other evidence. That scheme is inconsistent with the proposition that the production of the entry or the making of the entry is a condition precedent to the complaint. The proper conclusion for the justices to arrive at was not that they had no jurisdiction to hear the evidence in the case, but that, in the exercise of their discretion, they refused to do so, and that conclusion is still open to them.

AVORY J. I agree that the justices were wrong in holding that they had no jurisdiction to hear the complaint. The question here is whether entry of the alleged offence in the official log-book is a condition precedent to the hearing of a complaint of this kind before justices under the Merchant Shipping Act, 1894. In my view it would require plainer words to take away from the Court the jurisdiction which it would otherwise possess to deal with the particular offence than those which appear in this statute as to the absence of an entry in the log-book. I think that s. 228 (*d*) of the Merchant Shipping Act, 1894, means that in the absence of what the Legislature may have conceived to be the best

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evidence of the alleged offence the justices might in their discretion refuse to proceed and might hear other evidence than that which would be ordinarily found in the log-book. If that were not so it would lead to the absurd result which I suggested during the argument, that if seamen were to assault the master and other officers and render them incapable of making the entry in the log-book they would thereby save themselves from the risk of judicial proceedings. I cannot believe that that was intended by this provision in the Act, and I think that the real intention of the Act was that the entry in the log-book should wherever practicable be admissible as the best evidence, and that in default of that the justices might in their discretion hear any other evidence which might be available. The case must go back to the justices, together with the opinion of this Court.

SWIFT J. I agree that the case must be remitted to the justices for the reasons given.

Appeal allowed.

Solicitors for appellant: *Botterell & Roche, for Botterell, Roche & Temperley, Newcastle-on-Tyne.*

F. P. F.

LONDON COUNTY COUNCIL *v.* MAHER.

1929
April 16.

Education—Deaf Child—Attendance at School—Reasonable Excuse—Education Act, 1921 (11 & 12 *Geo.* 5, *c.* 51), *ss.* 49, 51, *sub-s.* 2.

The Education Act, 1921, provides in s. 49 that any of the three reasons therein set out, which may be summarized as follows: (*a*) sickness; (*b*) no school open within three miles; (*c*) efficient instruction in some other manner, shall be a reasonable excuse for not causing a child to attend school:—

Held, that those three reasons were not an exhaustive enumeration of what would be a reasonable excuse, but that if facts were established showing an excuse within one of the categories (*a*), (*b*) and (*c*), the tribunal must accept the excuse as being a reasonable excuse. If, however, parents sought to find a reasonable excuse outside the named categories (*a*), (*b*) and (*c*), the tribunal were not bound to accept it; the tribunal must decide whether the facts, in their opinion, showed a reasonable excuse.

CASE stated by justices for the Blackheath Division of the County of London.

An information was preferred under the Education Act, 1921, by J. A. P. Brown, on behalf of the appellants, the London County Council, before a court of summary jurisdiction at Woolwich, against the respondent, Dorothy Maher, charging her that on October 9, 1928, and on divers other dates within the six months then last past, she, being the parent of a deaf child named Dorothy Maher between the ages of seven and sixteen years, within the meaning of s. 138 of the Education Act, 1921, neglected and omitted to cause the child to attend school, there being no reasonable excuse for such non-attendance, contrary to the by-laws of the said Council in such case made and provided and contrary to the Education Act, 1921.

At the hearing of the information on October 25, 1928, the following facts were proved or admitted:—

(*a*) The child, Dorothy Maher, was aged fourteen years, and was, in pursuance of s. 55, sub-s. 3, of the Education Act, 1921, certified to be deaf.

(*b*) The school certified by the Board of Education as suitable for providing elementary education for deaf children within the appellants' area was the Oak Lodge Residential School, Clapham Common.

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(*c*) The child did not attend at that school on any day between April 9, 1928, to October 9, 1928, inclusive, though she might have made 224 attendances during that time.

(*d*) The respondent caused the child to attend at the Gordon London County Council Evening Institute, but the child was struck off the roll of that institute as being ineligible for an evening school.

(*e*) The respondent had also caused the child to attend at a private school called Eltham Park Commercial College, but the principal of that school had refused to allow the child to remain after being informed by the appellants that the child had been certified to be deaf.

(*f*) Neither the Gordon London County Council Evening Institute nor the Eltham Park Commercial College was a school certified by the Board of Education as suitable for providing elementary education for deaf children.

(*g*) The respondent was prepared to send the child to a non-residential school certified as suitable for providing elementary education for deaf children.

It was contended on behalf of the appellants that the respondent had failed to prove that there was a reasonable excuse, within the meaning of s. 49 of the Education Act, 1921 (1), for the non-attendance of the child Dorothy Maher at the Oak Lodge Residential School.

(1) Education Act, 1921, s. 49: "Any of the following reasons shall be a reasonable excuse for the purposes of this Act and the bye-laws made thereunder, namely:—

(*a*) That the child has been prevented from attending school by sickness or any unavoidable cause;

(*b*) That there is no public elementary school open which the child can attend within such distance, not exceeding three miles, measured according to the nearest road from the residence of the child, as the bye-laws may prescribe.

(*c*) In the case of non-compliance with a bye-law requiring a parent to cause his child to attend school, that the child is under efficient instruction in some other manner:

Provided that where the local education authority provides suitable means of conveyance for a child between a reasonable distance of its home and a public elementary school, it shall not be a reasonable excuse within the meaning of this section that there is no public elementary school open which the child can attend within such prescribed distance as aforesaid."

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It was submitted on behalf of the respondent that she had shown a reasonable excuse for non-attendance at school inasmuch as she had sent the child to two other schools—namely, the Gordon London County Council Evening Institute and Eltham Park Commercial College, and the child had been prevented from remaining at either of those schools by the pressure of the appellants, and that she was willing to send the child back to Eltham Park Commercial College.

The justices found as a fact that the respondent had taken steps to provide efficient instruction for the child in some other manner than by attendance at the Oak Lodge Residential School, and that a reasonable excuse for neglecting or omitting to cause the child to attend school had been shown, and they accordingly dismissed the information.

The questions for the decision of the High Court were :—(1.) Whether the steps taken by the respondent to provide efficient instruction in some other manner than by attendance at Oak Lodge Residential School afforded a defence to the respondent to the information; and (2.) whether there was evidence on which the justices could find that a reasonable excuse for neglecting or omitting to cause the said child to attend school had been shown.

L. A. Byrne for the appellants. The three reasons set out in s. 49 of the Education Act, 1921, which are virtually repeated in Regulation 5 of the by-laws made by the London

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By-laws made by the London County Council on March 3, 1925, under Part IV. of the Education Act, 1921.

. . . . . .

Children to attend School.

2. "The parent of every child of not less than 5 nor more than 14 years of age shall cause such child to attend school unless there be a reasonable excuse for non-attendance."

. . . . . .

Reasonable Excuses.

5. "Any of the following reasons shall be a reasonable excuse, namely :—

(*a*) That the child is under efficient instruction in some other manner.

(*b*) That the child has been prevented from attending school by sickness or any unavoidable cause.

(*c*) That there is no public elementary school open which the child can attend within two miles measured according to the nearest road from the residence of the child."

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County Council with regard to school attendance, are the only reasons which afford a reasonable excuse to a parent for not causing a child to attend a public elementary school. In *Jones* v. *Rowland* (1) it was held that the fact that a parent of a child sends the child to a school to which the parent knows the child will not be admitted does not afford the parent a reasonable excuse for not causing the child to attend school.

[LORD HEWART C.J. Both s. 49 of the Act of 1921 and the by-law made by the appellants under s. 46 say that "any of the following reasons shall be a reasonable excuse." Neither the section nor the by-law says that no other reason shall be a reasonable excuse. The reasons given are merely examples of what is a reasonable excuse.]

The tribunal must give effect to the whole scope of the Education Act, which is to provide that every child between the ages of five and fourteen shall receive efficient elementary instruction. Sect. 51, sub-s. 2, provides that "the fact that there is not within any particular distance from the residence of a blind or deaf child any public elementary school which the child can attend, shall not of itself be a reasonable excuse for not causing the child to attend school." The result of reading that section together with s. 49 is that where a child is blind or deaf only the reasons set out in paras. (*a*) and (*c*) of s. 49 afford a reasonable excuse for the child not attending school. There is nothing in the case to show that the appellants provided suitable means of conveyance for the child between its home at Eltham and the school at Clapham Common, a distance of about twelve miles. That school was a residential school and not a day school.

Elliot Gorst for the respondent was not called upon.

LORD HEWART C.J. We need not trouble you, Mr. Gorst.

This is a case stated by justices after the hearing of an information which was preferred by one John Alexander Partridge Brown, acting for the present appellants, against Dorothy Maher, the present respondent. The information alleged that the respondent on October 9, 1928, and on various other days, at Eltham in the County of London,

(1) (1899) 63 J. P. 454.

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being the parent of a deaf child, which child was not less than seven nor more than sixteen years of age, within the meaning of s. 138 of the Education Act, 1921, did neglect and omit to cause the said child to attend school, there being no reasonable excuse for such non-attendance, contrary to the by-laws of the Council in such case made and provided and contrary to the Education Act, 1921.

The justices, having heard the evidence, dismissed the information for the reason which they set out in the case. They say: "We found as a fact that the respondent had taken steps to provide efficient instruction for the said child in some other manner than by attendance at the Oak Lodge Residential School, and that a reasonable excuse for neglecting or omitting to cause the child to attend school had been shewn." The question for this Court is whether the justices, in arriving at that conclusion, came to a correct determination in point of law.

It is a little important to see what the facts of the case were. This child was a little girl. This parent was a mother, and it is quite obvious that the desire of the mother was that her little girl should live under her own roof at home. The school, however, which was certified by the Board of Education as suitable for providing elementary education for deaf children within the area of the appellants, was the Oak Lodge Residential School at Clapham Common, and it appears to be the fact that that school was distant from the respondent's home something like twelve miles. It followed, therefore, that if the child had to attend that school one of two things must happen; either the child must go into residence at that school and be taken from the home of the mother or suitable means of conveyance must be provided to take the child to and fro daily over this distance of twelve miles each way. What in fact happened was that the child did not attend the Oak Lodge Residential School, but the case finds that the mother caused the child to attend at the Gordon London County Council Evening Institute. From the roll of that Institute the name of the child was struck off upon the ground that she was not eligible for an evening

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school. Thereupon the mother caused the child to attend at a private school called the Eltham Park Commercial College. But the principal of that school refused to allow the child to remain after the happening of a certain event, and that event was this: that the principal of the school was informed by these appellants, the London County Council, that the child had been certified to be deaf. Apparently, but for that communication from the appellants to the principal, there was nothing to prevent the child from continuing to be educated at the Eltham Park Commercial College. The case further finds that the respondent was prepared to send the child to a non-residential school certified as suitable for providing elementary education for deaf children. In these circumstances the justices have come to the conclusion that this parent did not commit a crime, but on the contrary had a reasonable excuse.

To my mind it is tolerably obvious that she had a reasonable excuse unless, indeed, the Act of Parliament has been phrased in such a manner as to prevent circumstances of this kind from amounting to a reasonable excuse. It is not necessary to re-read the sections of the Education Act, 1921, which impose the duties upon the Education Authority on the one hand and the parent on the other hand. But when one comes to the precise words in which the Act of Parliament deals with the topic of reasonable excuse, it seems to me that light is thrown upon the true nature of the controversy. By s. 49 of that Act it is provided that "any of the following reasons shall be a reasonable excuse for the purposes of this Act and the bye-laws made thereunder"; and then there follow three reasons, which may be shortly described in this way (*a*) sickness; (*b*) no public elementary school open; (*c*) child under efficient instruction elsewhere. Now it is to be observed that the statute says that "any of the following reasons shall be a reasonable excuse for the purposes of this Act and the bye-laws made thereunder." What is the meaning of the words "shall be"? The section does not say: "There shall be no reasonable excuse except" so and so. In my opinion that section was drawn in that

way for a twofold purpose. On the one hand the legislature was contemplating possible prosecutions, because by another section it is provided that where the Act is not complied with in certain respects penalties may be imposed, and the Act I think was saying that, once facts are established which exhibit an excuse falling within one of these categories (*a*), (*b*) or (*c*), the tribunal must regard the excuse as reasonable and has no choice in the matter; and, secondly, I think the legislature was reflecting that under this statute there was power to make by-laws, and therefore the section says that when these by-laws come to be made, whatever else may be excluded from the class of excuses which may be reasonable, none of these three categories (*a*), (*b*) and (*c*) shall be so excluded. In other words, as Mr. Byrne on behalf of these appellants very frankly admitted, these excuses do not purport to be an exhaustive enumeration of reasonable excuses. They are an enumeration of excuses which, if established, must be accepted willy-nilly by the tribunal. And in like manner, when one comes to look at the by-law made under the Act, the by-law says this: "The parent of every child of not less than five nor more than fourteen years of age shall cause such child to attend school unless there be a reasonable excuse for non-attendance," and when one looks at the by-law relating to reasonable excuses, the same affirmative form is observed as that which is observed in the statute: "Any of the following reasons shall be a reasonable excuse" —not "may be," but "shall be"—namely: "(*a*) that the child is under efficient instruction in some other manner, (*b*) that the child has been prevented from attending school by sickness or any unavoidable cause, (*c*) that there is no public elementary school open which the child can attend within two miles measured according to the nearest road from the residence of the child." In other words, the by-laws which were framed by the appellants scrupulously observe the scheme and system of the Act, and are content to enumerate as the excuses which, if made, must be accepted as a reasonable excuse those which are to be found in the Act. What is the effect of that method? The effect is, as

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Mr. Byrne frankly admits, that there is left an unexplored field of facts within which the parent may seek to find a reasonable excuse. But if he seeks to find that excuse outside the categories (*a*), (*b*) and (*c*) set out in this Act, it does not follow that the tribunal will consent to accept it. On the other hand it does not follow that the tribunal will refuse to accept it. The question for the tribunal in that case will be, not whether the excuse is one which falls within the named reasonable excuses in the statute and by-laws, but whether the excuse is one which, having regard to all the circumstances of the case, the tribunal thinks is reasonable. In my opinion that is the question to which these justices directed their minds. It appears to me, therefore, that they have not misunderstood the law, and that there were materials entitling them to come to the conclusion to which they came. I think therefore that this appeal fails and should be dismissed.

AVORY J. The learned counsel who appears for the appellants in this case having admitted that s. 49 of the Education Act, 1921, does not exhaust all the reasonable excuses which may be made for the non-attendance of a child at school, I am of opinion in answer to the second question put by the special case, that there was evidence before the justices on which they could find that a reasonable excuse for neglecting or omitting to cause the child to attend school had been shown.

It is to be observed that in the case, to which our attention has been called, of *Jones* v. *Rowland* (1) the justices found the other way; they found as a fact that there was no reasonable excuse, and the Court merely affirmed that finding of fact in that case.

I agree that the appeal must be dismissed.

SWIFT J. I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitor for appellants: *S. A. R. Preston-Hillary.*

Solicitor for respondent: *F. W. Beech, Eltham.*

(1) 63 J. P. 454.

R. F. S.

DUDLEY AND DISTRICT BENEFIT BUILDING SOCIETY *v.* GORDON.

1929
April 17.

Landlord and Tenant—Mortgage—Attornment Clause—Right of Entry by Mortgagees on Default in Payments by Mortgagor—Seven days' Notice to determine Tenancy—"Term . . . . determined by a legal notice to quit or otherwise"—Small Tenements Recovery Act, 1838 (1 *& 2 Vict. c.* 74), *s.* 1.

A mortgage deed contained a clause by which the mortgagor attorned tenant from year to year to the mortgagees at a nominal rent. It was also provided that, if the mortgagor made default in payments under the deed, the mortgagees might give to the mortgagor seven days' notice in writing to determine the tenancy created by the deed. The mortgagor defaulted and the mortgagees served on him a notice to quit. The mortgagor refused to give up possession:—

Held, that the term or interest of the mortgagor in the mortgaged property had been "duly determined by a legal notice to quit or otherwise" within s. 1 of the Small Tenements Recovery Act, 1838, and that, therefore, justices had power to issue a warrant to give possession of the property to the mortgagees.

Friend v. *Shaw* (1887) 20 Q. B. D. 374 and *Arden* v. *Boyce* [1894] 1 Q. B. 796 distinguished.

Case stated by justices.

At a court of summary jurisdiction sitting at Brierley Hill, Staffordshire, in and for the division of Kingswinford and Wordsley, a complaint was made on behalf of the appellants, the Dudley and District Benefit Building Society, under s. 1 of the Small Tenements Recovery Act, 1838 (1), against the

(1) By the Small Tenements Recovery Act, 1838, s. 1: "When and so soon as the term or interest of the tenant of any house . . . . held by him at will or for any term not exceeding seven years, either without being liable to the payment of any rent or at a rent not exceeding the rate of 20*l.* a year . . . . shall have been duly determined by a legal notice to quit or otherwise, and such tenant . . . . shall neglect or refuse to quit and deliver up possession of the premises . . . . it shall be lawful for the landlord of the said premises or his agent to cause the person so neglecting or refusing to quit and deliver up possession to be served . . . . with a written notice . . . . of his intention to proceed to recover possession under the authority and according to the mode prescribed in this Act; and if the tenant or occupier shall not thereupon appear . . . . and show to the satisfaction of the justices . . . . reasonable cause why possession should not be given under the provisions of this Act and shall still neglect or refuse to deliver up possession of the premises . . . . it shall be lawful for such landlord or agent to give to such justices

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respondent, William Gordon, alleging that he had neglected to deliver up possession of a house and premises situated at 94 Wallows Street, Round Oak, Staffordshire, which he held of the appellants under a tenancy from year to year, that tenancy having been determined by a notice to quit. The justices were therefore asked to issue their warrant directing the constables of the division to enter into the premises and give possession of them to the appellants.

On the hearing of the application the following facts were proved or admitted :—

The respondent, then being the owner and occupier in fee simple of 94 Wallows Street, by a mortgage dated May 4, 1927, and made between himself of the one part and the appellants of the other part, charged the property by way of legal mortgage to the appellants as security for the sum of 180*l.* advanced by the appellants to him, and interest thereon.

By the mortgage deed powers were reserved to the appellants to let or sell the property, and also "to enter into possession or receipt of the rents of the said property or any part thereof," it being provided that the appellants should not exercise these powers "unless and until the mortgagor shall have made default for three lunar months in payment of some such instalment, subscription, fine, or other moneys as hereinbefore referred to or some part thereof." Clause 9 of the mortgage deed provided : "(i.) The mortgagor hereby attorns and becomes tenant from year to year to the Society [i.e., the appellants] of the said property or of such part thereof as is in the occupation of the mortgagor at the yearly rent of 10*s.* (ii.) If the Society shall at any time by virtue of these presents or of the rules for the time being of the Society become entitled to enter into possession or receipt of the rents of the said property,

proof of the holding and of the end or other determination of the tenancy . . . . and upon proof of service of the notice, and of the neglect or refusal of the tenant . . . . it shall be lawful for the justices . . . . to issue a warrant . . . . to the constables . . . . commanding them . . . . to enter . . . . into the premises, and give possession of the same to such landlord or agent . . . ."

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then the Society may at any time thereafter on giving to the mortgagor seven days' notice in writing in that behalf determine the tenancy hereby created . . . ."

On October 29, 1928, the respondent was in default for more than three lunar months in paying to the appellants the subscriptions due under the mortgage deed. The tenancy created by clause 9 (i.) of the deed was determined by a notice to quit served on the respondent on October 29, 1928, requiring him to vacate the premises on or before November 7, 1928. On November 23, 1928, the statutory notice required by s. 1 of the Small Tenements Recovery Act, 1838, to be served on the respondent of the application then to be made to the justices was served on him.

The justices found that the annual value of the premises was 13*l.* 10*s.* a year or thereabouts, and that the rental (fixed by the mortgage deed) was 10*s.* a year. They also found that the respondent had not shown any reasonable cause for not giving up possession of the premises and that he still neglected and refused to give up possession. They concluded that it was a fit and proper case to order the issue of an ejectment warrant if they had jurisdiction to do so.

They formed the opinion, however, that the Small Tenements Recovery Act, 1838, did not give to courts of summary jurisdiction power to deal with a case where a question of title was involved and did not apply to a case where an attornment as tenant by a mortgagor to his mortgagee only came into operation when the mortgagor had made default in payments under the mortgage deed. They therefore dismissed the complaint.

The appellants appealed.

Ralph Thomas for the appellants. The justices were wrong. The tenancy created by the attornment clause in the mortgage deed was determined, if not "by a legal notice to quit" within s. 1 of the Small Tenements Recovery Act, 1838, in the sense of the notice to quit applicable to a yearly tenancy at common law, by a process which came within the words "or otherwise" in the section. Ejusdem generis the words

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"or otherwise" must mean a notice other than a "legal notice to quit." Therefore, the justices had jurisdiction to issue their warrant. *Friend* v. *Shaw* (1) and *Arden* v. *Boyce* (2), which were relied on by the justices, are distinguishable, because the words there under consideration were "determined . . . . by a legal notice to quit" in s. 50 of the County Courts Act, 1856, the first case, and "determined by notice to quit" in R. S. C., Order III., r. 6 (*f*), in the second case, the words "or otherwise" not being present in either. But in *Daubuz* v. *Lavington* (3), which was followed in *Hall* v. *Comfort* (4), the facts were similar to those of the present case, and it was held that the mortgagor was a tenant whose term had been "determined by notice to quit" within R. S. C., Order III., r. 6 (*f*). The power reserved to the appellants by the mortgage deed to enter into possession of the mortgaged property did not depend on forfeiture: per Lord Esher M.R. in *Kemp* v. *Lester*. (5)

The respondent did not appear.

LORD HEWART C.J. The effect of clause 9 (i.) of the mortgage deed was that seven days' notice in writing should suffice to determine the tenancy created by the deed, although that tenancy was from year to year. Difficulty has arisen because it was held in *Friend* v. *Shaw* (1) that such a notice to quit as was given in the present case was not a legal notice to quit, that phrase being taken to mean the notice which attaches by operation of law to a particular tenancy, as distinct from a notice expressly agreed on between the parties. In *Friend* v. *Shaw* (1) and *Arden* v. *Boyce* (2), however, the operative words were "determined . . . . by a legal notice to quit" and "determined by notice to quit" and nothing more, while in s. 1 of the Small Tenements Recovery Act, 1838, the words are "determined by a legal notice to quit or otherwise." Some meaning must be given to the words "or otherwise." Because of the presence of those

(1) 20 Q. B. D. 374.
(2) [1894] 1 Q. B. 796.
(3) (1884) 13 Q. B. D. 347.
(4) (1886) 18 Q. B. D. 11.
(5) [1896] 2 Q. B. 162, 164.

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words in the section it seems to me that *Friend* v. *Shaw* (1) and *Arden* v. *Boyce* (2) have no application to the present case. On the other hand, in my opinion, those words entitle the appellants to succeed. In *Kemp* v. *Lester* (3) Lord Esher M.R. pointed out that a right to enter into possession such as that which the appellants had under this deed did not depend on forfeiture. The justices had jurisdiction to deal with the matter and, as they considered it a fit and proper case for the issue of an ejectment warrant, if they had jurisdiction to issue it, the appeal should, I think, be allowed.

AVORY J. I agree. The view of the justices that the Small Tenements Recovery Act, 1838, does not give courts of summary jurisdiction power to deal with a case where a question of title is involved is erroneous. Obviously justices cannot deal with any case under the Act without having to decide some question of title. I agree that in principle *Kemp* v. *Lester* (3) is an authority for the justices having jurisdiction in such a case. If, in such circumstances as are present here, the High Court has jurisdiction to enter summary judgment under Order XIV., there seems to be no reason why justices should not have similar power to give possession of premises which fall within s. 1 of the Act of 1838.

SWIFT J. I agree.

Appeal allowed.

Solicitors for appellants: *Marcy & Robinson, for Hooper & Fairbairn, Dudley.*

(1) 20 Q. B. D. 374. (2) [1894] 1 Q. B. 796.
(3) [1896] 2 Q. B. 162, 164.

G. F. L. B.

1929
April 10, 29.

MIDDLESEX COUNTY COUNCIL *v.* HALL.

Landlord and Tenant—Rent Restriction—Premises used as Dwelling-house and for Business Purposes—Alternative Accommodation—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 5—*Rent and Mortgage Interest Restrictions Act*, 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 4.

The alternative accommodation which must be offered to the tenant by an applicant for possession under the Rent Restriction Acts of premises used as a dwelling-house and also as business premises, need only be as regards their user as a dwelling-house, and not as regards their user as business premises.

Wilcock v. *Booth* (1920) 89 L. J. (K. B.) 864 applied.

Appeal from Uxbridge County Court.

The plaintiffs, the Middlesex County Council, were the landlords, and the defendant was the tenant of a house which had been formed by throwing two cottages into one (1), in which house he dwelt, and also carried on therein the business of a teashop. The house was within the protection of the Rent Restriction Acts. The plaintiffs, for the purpose of widening the road, had purchased the house in 1925. They gave the defendant due notice to quit, purporting to act under s. 5, sub-s. 1 (*e*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), as it now stands by virtue of s. 4 of the Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 Geo. 5, c. 32), the house being "reasonably required for the purpose of the execution of the statutory duties or powers of a local authority." By the same sub-section an order for the recovery of possession cannot be made unless the Court "is satisfied . . . . as respects alternative accommodation." It was admitted that the plaintiffs had offered the defendant suitable alternative accommodation so far as the user of the house as a dwelling-house was concerned, but it was not disputed

(1) Talbot J., when giving judgment, stated that they had received a communication from the defendant denying that the house had been so formed. But Talbot J. stated that that fact was immaterial to the decision.

that the alternative accommodation offered as regarded the user of the house for business purposes was not suitable. The county court judge held that the alternative accommodation offered must be suitable in both respects, and accordingly refused to make an order for recovery of possession.

The plaintiffs appealed.

S. H. Smith for the plaintiffs. The county court judge was wrong in holding that it was necessary to offer alternative business accommodation as well as alternative house accommodation. He so held, relying on s. 12, sub-s. 2 (ii.), of the Act of 1920, which says that "the application of this Act to any house or part of a house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade, or professional purposes." But these words were inserted in order to prevent the contention that the intention of the parties in the letting of the premises must be looked at and that the intention was that such premises should not be used as a dwelling-house only, and were therefore not within the Act. The sub-clause does not purport to deal with the question of what alternative accommodation must consist. There is no direct authority on this point, but the Court in *Wilcock* v. *Booth* (1), where the facts were similar, decided that under s. 1, sub-s. 1 (*c*), of the Increase of Rent, &c. (Amendment), Act, 1919 (9 & 10 Geo. 5, c. 90), it was only necessary to offer alternative house accommodation. The ground of that decision was that, although the word "accommodation" was wide enough to include shop accommodation, the preamble and sections of what was then the principal Act, the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915 (5 & 6 Geo. 5, c. 97), showed that it was dealing with dwelling-houses only. The reasoning in that case is applicable to the present case. At the time that case was decided business premises were not within the Rent Acts, nor were they in 1923.

(1) (1920) 89 L. J. (K. B.) 864.

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As the defendant is not represented attention is drawn to two cases in which the same view was taken as that taken by the county court judge. These are the Irish case of *Irvine* v. *Nelson* (1) and the Scottish case of *Cameron* v. *Wilson* (2), but neither decision is binding on this Court.

[*Gidden* v. *Mills* (3) was also referred to.]

The defendant was not represented.

Cur. adv. vult.

1929. April 29. The judgment of the Court (TALBOT and HUMPHREYS JJ.) was read by

TALBOT J. This is an appeal by the plaintiff council from the judgment of a county court refusing an order for the possession of a dwelling-house of which the defendant is tenant and the plaintiffs are the landlords. The material facts, as they appear to have been held in the county court, are these: The dwelling-house in question is a house formed by throwing two small cottages, each of two rooms, into one. It is admitted that these cottages were within the protection of the Rent Restriction Acts. This change was effected by a Mr. Hunt, who owned the cottages and a small piece of land on part of which they stood. The county council bought the land from him in 1925 in order to widen the road on which it abutted. The defendant was weekly tenant of the present house and the land, first to Mr. Hunt from March, 1923, and then to the plaintiffs. He also had a coffee stall on part of the land, but that has now been removed, and he carries on the business (which has been somewhat extended) in the dwelling-house. The plaintiffs duly served a notice to quit on the defendant, purporting to act under s. 5, sub-s. 1 (*e*), of the Act of 1920 as it now stands by virtue of s. 4 of the Act of 1923. It is not disputed that the house was "reasonably required for the purpose of the execution of the statutory duties or powers" of the plaintiffs. By s. 5 the order for recovery of possession sought in the action cannot

(1) (1922) 56 Ir. L. T. 107. (2) 1922 S. L. T. (Sher. Ct.) 37.
(3) [1925] 2 K. B. 713.

be made unless the Court is satisfied "as respects alternative accommodation." To see what this means it is necessary to look at para. (*d*), which provides that the Court is not to make an order for possession unless it is satisfied "that alternative accommodation is available which is reasonably suitable to the means of the tenant and to the needs of the tenant and his family as regards extent, character, and proximity to place of work and which consists either of a dwelling-house to which this Act applies, or of premises to be let as a separate dwelling on terms which will afford to the tenant security of tenure reasonably equivalent to the security afforded by this Act in the case of a dwelling-house to which this Act applies." It was admitted in the court below that the plaintiffs had offered the defendant alternative accommodation which fulfilled the requirements of para. (*d*) so far as the user of the premises as a dwelling-house is concerned; but the county court judge held that he was entitled and bound to consider also whether the accommodation offered was reasonably suitable for the business which the defendant carried on in part of the house to recover possession of which the action is brought. On consideration of that question he came to the conclusion that it was not suitable. This was not disputed as a fact by the plaintiffs. Their contention was, both in the county court and before us, that the judge had no right, in dealing with the question of alternative accommodation, to consider the suitability of the premises for the purposes of business. (1)

The learned counsel for the appellants relied on *Wilcock* v. *Booth*. (2) The point there was exactly the same as in this case. There was a tenancy of a dwelling-house, a grocer's shop with an off-licence for the sale of beer. Alternative dwelling-house accommodation was offered, but it was not suitable for the business use to which the premises in question

(1) It was made clear by counsel for the plaintiffs that he did not question the right of the county court judge in considering whether it is "reasonable to make" an order for possession to take into consideration any financial hardship that would be caused to the tenant if the order were made: see *Williamson* v. *Pallant* [1924] 2 K. B. 173.

(2) 89 L. J. (K. B.) 864.

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had been put, and on this ground the county court judge held that sufficient alternative accommodation had not been offered. It was held by this Court, in a considered judgment delivered by Bray J., that the question of alternative accommodation was confined to "similar dwelling-house accommodation" (1), and a new trial was ordered so that other questions in the case might be dealt with. This would be an authority decisive of the present appeal but for the fact that it was upon a different statute—namely, the Increase of Rent, &c. (Amendment) Act, 1919. The words of s. 1, sub-s. 1, of that Act material in that case are these: "Unless .... (*c*) .... after considering all the circumstances of the case, including especially the alternative accommodation available for the tenant [the Court] considers it reasonable to make such an order"—that is to say, an order for possession.

It appears to us that that language is, in relation to this point, more favourable to the tenant than the language of the Act which we have to apply in this case, for on the face of it it is quite unlimited. But the Court, having regard to the scope and object of the Act, which protected dwelling-houses only, considered that the words "alternative accommodation available for the tenant" must be confined to accommodation for the purposes of habitation. The protection of the Act of 1920, as it operated when the section which we are considering was introduced into it by the Act of 1923, was in like manner confined to dwelling-houses, and the reasoning of the Court in that case seems therefore to apply to the present case. It is also instructive to compare the language of the paragraphs of the repealed s. 5 of the Act of 1920 with that which has been substituted for it by s. 4 of the Act of 1923. The words of the former Act are: "Unless . . . . (*d*) . . . . the court is satisfied that alternative accommodation, reasonably equivalent as regards rent and suitability in all respects, is available." It is evident that the later Act was intended to limit and define the matters which might be considered in relation to the question of alternative accommodation, and also that there

(1) 89 L. J. (K. B.) 865.

is nothing in the paragraph now in force which suggests the consideration of the suitability of the alternative premises for a business carried on by the tenant on the old premises.

The learned judge seems to have decided as he did on a view of a paragraph in s. 12 of the Act of 1920. It occurs in sub-s. 2 in the second of three provisos to that sub-section: "The application of this Act to any house or part of a house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade, or professional purposes." The simple meaning of that proviso appears to be that a dwelling-house is not the less a dwelling-house for the purposes of the Act because part of it is used as a shop or the like. This is merely a statutory enactment of what was already understood and declared to be the law, and is so stated in the judgment in *Wilcock* v. *Booth*. (1) We do not see that this has anything to do with alternative accommodation.

We were referred to two cases, one in Ireland and one in Scotland, in which the Courts appear to have taken a view similar to that of the learned judge in this case. The Irish case, *Irvine* v. *Nelson* (2), was decided on the original form of s. 5 (*d*) of the Act of 1920. We have pointed out the important difference between that enactment and that which has now been substituted for it. We certainly are not prepared to say that *Irvine* v. *Nelson* (2) was wrongly decided upon the words which the Court there had to consider. The Scottish case, *Cameron* v. *Wilson* (3), was also on the original form of s. 5 of the Act of 1920. On the whole, on the statute and on the authority of *Wilcock* v. *Booth* (1), we are of opinion that the learned county court judge was in error in considering the business use of the premises with reference to the question of alternative accommodation.

Another point was taken by the appellants, which in the circumstances is immaterial—namely, that the change effected by throwing the two cottages into one amounted to the "erection" of a house within s. 12, sub-s. 9, of the Act of

(1) 89 L. J. (K. B.) 864, 865. (2) (1922) 56 Ir. L. T. 107.
(3) 1922 S. L. T. (Sher. Ct.) 37.

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1920. We do not think that it would be so called in ordinary speech, and we think also that the distinction between reconstruction and erection which appears in the sub-section is very much against the appellants' argument. If turning one house into two is "reconstruction" as distinguished from erection, it seems to us that turning two houses into one must be the same. On this point we think the learned judge was right. Moreover, it would be impossible to say that he was bound, as a matter of law, on the facts proved, to hold that what was done amounted to the "erection" of a dwelling-house.

The appeal must be allowed, and judgment entered for the plaintiffs in the county court for possession.

Appeal allowed.

Solicitor for appellants: *C. W. Radcliffe.*

W. L. L. B.

ALDRIDGE *v.* WRIGHT.

C. A.
1929
March 12, 26.

Easement—Leasehold—Adjoining Premises—Assignment—Implied Reservation —Quasi-easement—Right of Way.

Two adjacent plots of land with a house upon each numbered respectively 28 and 30 were held by a leaseholder, G., upon two separate leases. Before the assignments hereafter mentioned a gate had been set in the boundary fence between the two plots having a bolt on the side of No. 28; in the opposite boundary fence of No. 30 was another gate giving access to a passage which ran along the side of No. 30 and led to a public highway; and the occupier of No. 28 had used, for receiving coal and disposing of rubbish, a way through the two gates across the garden of No. 30 and into the passage. There was no evidence of the terms, if any, on which this user was acquired or permitted.

G. assigned the lease of No. 30 to the plaintiff's predecessor in title. He subsequently assigned the lease of No. 28 to the defendant's predecessor in title. Neither of these assignments made mention of any quasi-easement over No. 30 in favour of No. 28 or the occupier thereof. The defendant asserted a right to use a way across No. 30. The plaintiff brought an action in the county court for trespass and for an injunction; the defendant counterclaimed for interference with her alleged right:—

Held, that the case fell within the rule in *Wheeldon* v. *Burrows* (1879) 12 Ch. D. 31, and not within any of the exceptions thereto; and that, as the assignment of the lease of No. 30 contained no reservation of any easement over that tenement, and the defendant's evidence was not sufficient to establish a grant of any such easement to the occupier of No. 28 before that assignment, the defendant's claim failed, and the plaintiff was entitled to judgment.

Rule in *Wheeldon* v. *Burrows*, supra, followed, and exceptions thereto considered.

Judgment of Divisional Court [1929] 1 K. B. 381 affirmed.

APPEAL from the decision of a Divisional Court (1) on appeal from the judgment of the county court of Surrey holden at Wandsworth.

The plaintiff, Mrs. Augusta Aldridge, brought an action against the defendant, Mrs. Margaret Mary Wright, claiming damages for trespass and an injunction to restrain the defendant from further trespassing.

The plaintiff was the occupier of a house and garden numbered 30 Selwyn Avenue, Richmond. The defendant was the occupier of the adjoining house and garden numbered 28 Selwyn Avenue. Along the side of No. 30 remote from

(1) [1929] 1 K. B. 381.

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No. 28 ran a passage communicating with Selwyn Avenue at right angles through a door opened and locked by a key which was kept in No. 30. On the other side of the passage was No. 32. The passage was separated from the back garden of No. 30 by a fence, in which there was a gate. Opposite to this gate was another gate, which was in the fence separating the back garden of No. 30 from that of No. 28, and which could be fastened by a bolt on the side of No. 28, and between these two gates was a path across the back garden of No. 30. The defendant claimed a right of way along this path into the passage for the purpose of carrying coal and rubbish from and to Selwyn Avenue. In fact the occupier of No. 28 had from 1896 to 1915 used the path for that purpose. The plaintiff however denied that any such right existed, and when the defendant insisted upon the right, the plaintiff erected a barrier to prevent any further user of the back of her tenement for that or any other purpose by the occupier of No. 28. The defendant broke down the barrier. The plaintiff brought the action, and the defendant counterclaimed for a declaration that she was entitled to the right of way.

The following statement of the facts relating to the title of the property in question is taken substantially from the written judgment of Scrutton L.J. :—

In 1895 one Edmund Hawkins was, as he was admitted still to be, the freeholder of certain land now built on and known as Nos. 28 and 30 Selwyn Avenue, and of the soil of the passage between 30 and 32. He entered into a building agreement with his son Henry James Hawkins to build houses on this land. The terms of the agreement were not proved, but it appeared that the plans of the proposed buildings submitted to the local authority showed no passage between Nos. 30 and 32, no gates in the fences, and no passage or way of any sort along the gardens. On October 5, 1895, Edmund Hawkins granted to H. J. Hawkins separate leases of Nos. 30 and 28. The houses were then unfinished and unoccupied. By the leases the lessor demised "All that piece or parcel of land messuage and premises situate and being No. 28"

(or 30 as the case might be) "Selwyn Avenue in the parish of Richmond in the county of Surrey which said premises are delineated in the plan drawn in the margin of these presents and thereon coloured Together with all rights easements and appurtenances whatsoever to the said premises belonging or appertaining To hold the said premises unto the lessee for the term of 99 years from September 29, 1894." The plans attached to the leases showed no passage way between No. 30 and No. 32, no gates in the fences, and no way across the garden of No. 30 or No. 28. The leases did not, after the demise of easements and appurtenances to the premises belonging or appertaining, add the words "or therewith used and enjoyed," which would have passed a discontinuous quasi-easement if anything of that kind had existed. There was no evidence when No. 28 was first occupied, or whether it was occupied before or after No. 30. On February 14, 1896, H. J. Hawkins assigned the two leases to one Gilbert. About this time a Mrs. White was tenant to Gilbert of No. 28. There was then a gate in the fence between No. 28 and No. 30 with a bolt on the side of No. 28, and there was a locked gate at the end of the passage between No. 30 and No. 32, the key of which was hung inside the passage door, and any one wanting to come in would get the key from No. 30. The freehold in Nos. 28 and 30 was still in Edmund Hawkins and the residue of the leases for 99 years was vested in Gilbert. On December 10, 1901, Gilbert assigned the residue of the lease of No. 30 to one Stevens, describing the premises as they had been described in that lease "with the appurtenances thereunto belonging or appertaining" and omitting any reference to easements therewith used or enjoyed. (1) On October 2, 1908, Stevens assigned the lease of No. 30 to a Mrs. Booth. In 1921 the plaintiff became tenant to Mrs. Booth, and on October 1, 1926, she became assignee of the lease of October 5, 1895.

On March 17, 1904, Gilbert assigned the lease of No. 28 to one Higgott. In 1916 the defendant became tenant of

(1) The extract from the judgment of Scrutton L.J. ends here.

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that house, and on September 12, 1927, she took an assignment of the lease of October 5, 1895, relating thereto.

The county court judge found that dust had been removed from No. 28 over the garden of No. 30 for many years, but that "the evidence was not clear whether or not it was by arrangement with the occupant of No. 30 who had the key of the gate into the passage, while the occupant of No. 28 had the key of the gate from 28 to 30, or controlled a bolt on the inside of the gate." He held that there was an implied grant of a quasi-easement—namely, a right of way through the gate of No. 28 and through the gate of No. 30 for the limited purpose of removing dust and bringing in coal. He therefore gave judgment for the defendant. On appeal the Divisional Court (Shearman and Finlay JJ.) reversed the judgment of the county court judge and gave judgment for the plaintiff.

The defendant appealed.

Du Parcq K.C. and *Charles Bray* for the appellant. The learned judges in the Divisional Court have decided in favour of the respondent upon different grounds. Shearman J. has held that because Gilbert, when in December, 1901, he assigned the long lease of No. 30 to Stevens, made no reservation of a path across that tenement in favour of No. 28, therefore the assignee of No. 30 took it free from any easement or quasi-easement such as is claimed by the appellant. The learned judge follows *Wheeldon* v. *Burrows* (1), and takes that case as an authority that the reservation by the grantor of any easement other than an easement of necessity over a tenement granted must be in express words. This is to give to *Wheeldon* v. *Burrows* (1) more than its proper effect. The decision in that case only laid down a general rule that a grantor of a tenement prima facie grants the premises unencumbered by easements in favour of other land which he retains, and that if he intends to reserve rights over the land granted he must make his intention clear by expressing it.

(1) 12 Ch. D. 31.

But this general rule is not without exception, and the easement of necessity is not the only exception. *Russell* v. *Watts* (1); *Thomas* v. *Owen* (2); *Westwood* v. *Heywood* (3); *Nicholls* v. *Nicholls* (4); and *Hansford* v. *Jago* (5) are instances of exceptions to the general rule. Finlay J. recognized that there were exceptions, but held that the county court judge had not found the necessary facts to bring this case within any of the exceptions. It is submitted that the learned judge was wrong in so holding. "The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is to be used": per Lord Parker in *Pwllbach Colliery Co.* v. *Woodman.* (6) At the date of the assignment of the lease of No. 30 by Gilbert to Stevens, the gate in the fence between No. 30 and No. 28 was in existence, with the bolt on the side of No. 28; and there was also the gate in the fence between No. 30 and the passage leading by the side of No. 30 into Selwyn Avenue. This was strong evidence of a common intention of the parties to the assignment that the occupier of No. 28 should have the right of way for certain purposes from No. 28 across No. 30 to the passage. The authorities cited above support the contention that, where the owner of two adjoining plots grants a lease of one of them, the circumstances may warrant the inference that both parties to the lease intended the reservation of an easement; where, for example, at the date of the lease the tenement let is constructed or conditioned with a view to the user by the occupier of the plot retained of a passage over the tenement let, and the user of such a passage is visibly necessary for the comfortable enjoyment of the plot retained. In *Thomas* v. *Owen* (2) the tenant of one farm had for many years used a lane which ran across a neighbouring farm. The landlord of both farms granted to the tenant of the

(1) (1885) 10 App. Cas. 590.
(2) (1887) 20 Q. B. D. 225.
(3) [1921] 2 Ch. 130.
(4) (1899) 81 L. T. 811.
(5) [1921] 1 Ch. 322.
(6) [1915] A. C. 634, 646.

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latter farm a lease of his farm, making no mention of the lane in the lease. Five years afterwards he granted a lease to the tenant of the first mentioned farm, again without making any mention of the lane. It was held that in the earlier lease there was an implied reservation of the right to use the lane in favour of the tenant or lessee of the first mentioned farm. The principle of that case was followed and applied in *Westwood* v. *Heywood* (1), and supports the judgment of the county court judge in the present case.

Havers for the respondent. A lessee cannot burden the demised premises with an easement, properly so called, in favour of another tenement. He can only create between himself and his so-called grantee an interest during the continuance of his lease. The question in this case is what happened in December, 1901, when Gilbert, a lessee, assigned his lease of No. 30 to Stevens, with the appurtenances thereto belonging or appertaining. Prima facie that assignment passed to Stevens, the assignee, the demised premises as they were in October, 1895, with no gate in the fence between No. 28 and No. 30. But, assuming for the sake of argument that Gilbert in December, 1901, could have found in Stevens a purchaser willing to take an assignment of No. 30 with a reservation of a right of way over that tenement in favour of the occupier of No. 28—an unusual form of assignment—the fact is that no such reservation was made, and the case falls within the general rule of *Wheeldon* v. *Burrows*. (2) The appellant contends that it comes within the exception to that rule said to have been recognized and approved in *Thomas* v. *Owen*. (3) The burden is upon the appellant to show that it does so. The ground of *Thomas* v. *Owen* (3) was that the landlord when he granted the plaintiff his lease had already granted to the defendant a right of way over the demised premises and could not derogate from that grant. To bring the present case within that exception the appellant has to show that Gilbert when he assigned the lease of No. 30 had already granted to the occupier of No. 28 a

(1) [1921] 2 Ch. 130. (2) 12 Ch. D. 31.
(3) (1887) 20 Q. B. D. 225.

right, or quasi right, of way over No. 30. At this point the appellant's case breaks down. The county court judge has declined to hold that the user by the occupier of No. 28 of the back of No. 30 was otherwise than by the licence and courtesy of the occupier of No. 30. But a licence may be revoked and a courtesy may be withheld. And this has been done.

Du Parcq K.C. in reply.

The following cases were also cited: *Brown* v. *Alabaster* (1); *Taws* v. *Knowles* (2); *Union Lighterage Co.* v. *London Graving Dock Co.* (3); *Ray* v. *Hazeldine* (4); *Lyttelton Times Co.* v. *Warners* (5); *Derry* v. *Sanders.* (6)

Cur. adv. vult.

March 26. The following written judgments were delivered:

SCRUTTON L.J. This appeal raises again the troublesome question which is frequently arising as to the rights of tenants of houses forming part of a row, to the use of a back passage for conveyance of their dust, coal or other matters, either against their fellow tenants or their landlord. It sometimes arises in the case of a strip of land at the bottom of the gardens demised, beyond the boundary fence. In the present case a right of way is claimed through the gardens themselves, not over any "formed way," to use a phrase common in the cases, but through the gardens themselves in a route only defined by the existence of gates in the party fences between the gardens, and a passage to the road between two houses which can in fact be reached through the series of gates in the party fences. The cases on the subject are numerous and difficult to distinguish.

The facts in the present case are as follows: In 1895 one Edmund Hawkins was, as he still is, the freeholder of certain land now built on and known as 28 and 30 Selwyn Avenue, Richmond, and of the soil of a passage between 30 and 32 Selwyn Avenue. This fact excludes the acquisition of any easement by prescription between numbers 28 and 30:

(1) (1887) 37 Ch. D. 490.
(2) [1891] 2 Q. B. 564.
(3) [1902] 2 Ch. 557.
(4) [1904] 2 Ch. 17.
(5) [1907] A. C. 476.
(6) [1919] 1 K. B. 223.

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Kilgour v. *Gaddes*. (1) One must look to express or implied grant; a man cannot have an easement over his own land, but when on his own land there are such physical structures as to suggest "an apparent and continuous easement" if two portions of the land belonged to different owners, there may be a quasi-easement, which on severance will go with the new quasi-dominant tenement created. A right of way, however, is not a continuous easement.

[The Lord Justice then stated the facts set out above, down to and including the assignment by Gilbert to Stevens on December 10, 1901, of the residue of the lease for ninety-nine years of No. 30, and proceeded:]

The case made by those interested in No. 30 is that, this being the first severance of the leasehold interest in the two houses, Nos. 28 and 30, inasmuch as the former leaseholder of the two houses granted No. 30 without any reservation of any right of way in favour of No. 28, he cannot now derogate from his grant by claiming such a reservation, on the principle laid down by Thesiger L.J. in *Wheeldon* v. *Burrows* (2); see also Norton on Deeds, 2nd ed. (1928), p. 290. There are exceptions to the doctrine of *Wheeldon* v. *Burrows*. (2) I do not see my way to attempt an exhaustive statement of those exceptions, as facts would immediately present themselves to prove my absence of foresight, and I find some of the suggested exceptions difficult to understand —but I do not find any suggested exception which covers the facts of this case. One is that a way of necessity is impliedly reserved; but it is admitted that the way claimed in this case is not a way of necessity. Another is where there is at the time of the severance a formed road or formed drain or watercourse used before the severance as of right by the tenant under the grantor of the alleged dominant tenement, in which case, as I understand, it is suggested that the grantor could not grant one set of premises so as to destroy the right of the tenant of another set of premises in respect of the premises he occupies, over the premises so granted. There must be an implied reservation of an existing right. In

(1) [1904] 1 K. B. 457. (2) 12 Ch. D. 31.

Hansford v. *Jago* (1) Russell J. extended this to "a strip of land worn and marked with rough tracks though without any made up road." In *In re Walmsley* (2) Eve J. declined to hold that a rough cart track over a vendor's land, previously used by permission of the vendor, passed as appurtenant to the property sold, which was reached by the cart track, though not only by that means. The defendant who claimed the right of way in the present case relied on a principle alleged to have been laid down by Lord Parker in *Pwllbach Colliery Co.* v. *Woodman.* (3) There a colliery company and a butcher held adjoining premises from the same landlord. The colliery company's operations of screening coal injured the butcher's meat, and he sued them. They replied that the butcher, being a subsequent grantee, took subject to their right conferred by the previous grant to carry on their coal business. The House of Lords held that the grant to the colliery company did not give them a right to commit a nuisance unless the trade they were authorized to carry on could not be carried on in any other way, and that this was not proved; also that there was nothing in the circumstances of the grant to confer the onerous and injurious easement claimed, a right to deposit coal-dust on the land of another. It will be seen that this has very little relation to the reservation of easements of rights of way on severance of the title to real property; moreover, the House of Lords was not referred to *Wheeldon* v. *Burrows* (4) or any case upon rights of way. But Lord Parker, after distinguishing implied easements of necessity and cases of continuous and apparent easements (of which a right of way is not one), dealt with easements granted by implication under two heads. After mentioning easements which are necessary for the enjoyment of some other right granted, he said (3): "The second class of cases in which easements may impliedly be created depends not upon the terms of the grant itself, but upon the circumstances under which the grant was made. The law will readily imply the grant or reservation of such easements as may be necessary

(1) [1921] 1 Ch. 322.
(2) [1917] 1 Ch. 93.
(3) [1915] A. C. 634, 646.
(4) 12 Ch. D. 31.

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to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is to be used: see *Jones* v. *Pritchard* (1) and *Lyttelton Times Co.* v. *Warners.* (2) But it is essential for this purpose that the parties should intend that the subject of the grant or the land retained by the grantor should be used in some definite and particular manner. It is not enough that the subject of the grant or the land retained should be intended to be used in a manner which may or may not involve this definite and particular use." It will be noticed that this relates to grant, not to reservation from grant in favour of property of the grantor. The question in this case is not what was granted to No. 28 by the lease, but what was reserved to No. 28 as a right over No. 30 either when separate leases were granted to H. J. Hawkins without any mention of such right, or when Gilbert assigned his lease of No. 30 to Stevens without any reservation of a right over No. 30 in favour of No. 28. In order to discover the common intention of the parties there must be considered the terms of the grants, the plans (if any) of the tenements in question, and the user (if any) of the right claimed. Now questions of fact in an appeal from the county court are for the county court judge. He finds as follows: "It appeared from the evidence of former tenants of No. 28 that dust had been removed from that house over the garden of No. 30 for many years past, but the evidence was not clear whether or not it was by arrangement with the occupant of No. 30, who had the key of the gate into the passage, while the occupant of No. 28 had the key of the gate from 28 to 30, or controlled a bolt on the inside of the gate. The key to a gate leading from the passage to Selwyn Avenue was hung up inside and was accessible to any person getting into the passage." There was evidence of disputes during the tenancies of the present tenants, the tenant of No. 30 saying that she allowed the user by courtesy. There was also evidence of disputes during the possession of Mr. Higgott between 1904 and 1915, when

(1) [1908] 1 Ch. 630. (2) [1907] A. C. 476.

matters had reached the stage that there were two fences and two gates between No. 28 and No. 30. I see no evidence of a claim of user as of right admitted or acquiesced in, and I am not able to supply the answer which the county court judge has refused to find to the question whether the user was by arrangement or as of right. He found a user for the limited purpose of carrying dust or coal, but declines to find whether the user was of right or of courtesy. As regards No. 30 the easement claimed is a burdensome one, for if the presence of a gate in a party fence involves an easement as of right, it seems probable (though I do not decide this question) that there is a similar easement for a number of other houses beyond No. 28, involving a procession of coal heavers and dustmen over a back garden through which there is no defined track. I think the grantee of No. 30, when his grantor claims to have impliedly reserved such a right from his grant, though it is not mentioned in his grant, is entitled to require the clearest evidence of an "intention of the parties" that there should be reserved for the benefit of No. 28 an easement or quasi-easement to be used and enjoyed as of right. In my opinion the defendant has failed to show such a common intention or implied reservation in this case; the doctrine of *Wheeldon* v. *Burrows* (1) applies; the decision of the Divisional Court must be affirmed, and the appeal dismissed.

GREER L.J. The plaintiff in the county court claimed against the defendant damages for trespass and an injunction to restrain the defendant from repeating the acts of trespass complained of. The defendant counterclaimed for a declaration that she was entitled to a right of way across the plaintiff's garden. The plaintiff was and is the lessee of No. 30 Selwyn Avenue, Richmond, the defendant being the lessee in occupation of the adjoining house, No. 28. The plaintiff being in possession, the acts complained of were admittedly acts of trespass unless the defendant established that she was entitled as of right to do what she did. The onus of proof

(1) 12 Ch. D. 31.

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was therefore on the defendant, both on the claim and counterclaim. She alleged that she had acquired under her lease a right to use the space between the gate of her garden at the rear of her house and the gate of the plaintiff's garden which led to a common passage and by that common passage to the street. The material facts proved were that on October 5, 1895, the freeholder had granted two building leases, one of the land on which No. 28 was built, and one of the land on which No. 30 was built, to one H. J. Hawkins. The plans in the leases did not contain any indication that there was to be any path or right of way from No. 28 through the garden of No. 30, or that any gates were to be erected enabling the lessee of No. 28 to obtain access across the garden of No. 30, to the land beyond; nor did they show that there was intended to be a passage leading along the side of No. 30 to Selwyn Avenue. There was no evidence of the existence of the gate between the two gardens before No. 28 was first occupied. There was no evidence showing which of the two houses was first let. On February 14, 1896, H. J. Hawkins assigned the two leases to Gilbert. It was proved that the first tenant of No. 28, Mrs. White, occupied for nine years and that during that time the gates mentioned were in existence, and the dust and refuse from No. 28 were removed from time to time by being taken across the garden of No. 30 and between the two gates into a passage which had come into being between No. 30 and the next house, No. 32. Coal was also delivered over the same route. At the end of Mrs. White's tenancy in 1904, Mr. Higgott went into occupation. He was there for eleven years during which there was a similar user of the alleged right as in Mrs. White's time. He said in his evidence that he had a dispute, but it does not appear from the judge's note what the dispute was about. The defendant became tenant in 1916, and for some considerable time she was permitted by the plaintiff to continue to use the access to the passage in the same way as the earlier tenants had done. In 1927 the lease of No. 28 was assigned by Gilbert to the defendant. Meanwhile, in December, 1901, Gilbert had assigned the lease of No. 30 to the plaintiff's

predecessor in title, whose tenant the plaintiff became and from whom she purchased the lease in October, 1926.

It is apparent from these facts that the leasehold interest was not severed until December, 1901, and the question to be determined is whether there was to be implied in the assignment of No. 30 a reservation to the assignor of a right of way for himself and his tenants for the limited purposes above mentioned. The county court judge did not find it possible on the evidence to decide whether the user which was proved was one which purported to be a user as of right, or whether it was only by courtesy of the occupant of No. 30.

The case raises a question of considerable difficulty owing to the decisions which have established many exceptions to the general rule laid down in *Wheeldon* v. *Burrows* (1) on the subject of implied reservations when an owner sells part of his property and retains part adjoining that which he has sold. The general rule was stated in *Wheeldon* v. *Burrows* (2) in clear and definite terms in a judgment delivered by Thesiger L.J. in the Court of Appeal, a judgment in which James and Baggallay L.JJ. concurred. "We have had," said the Lord Justice, "a considerable number of cases cited to us, and out of them I think that two propositions may be stated as what I may call the general rules governing cases of this kind. The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean quasi easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted. The second proposition is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. Those are the general rules governing cases of this kind, but the second of those rules is subject to certain exceptions. One of those exceptions is the well known

(1) 12 Ch. D. 31. (2) 12 Ch. D. 49.

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exception which attaches to cases of what are called ways of necessity; and I do not dispute for a moment that there may be, and probably are, certain other exceptions, to which I shall refer before I close my observations upon this case. Both of the general rules which I have mentioned are founded upon a maxim which is as well established by authority as it is consonant to reason and common sense, viz., that a grantor shall not derogate from his grant."

This general rule has been applied in a number of cases since *Wheeldon* v. *Burrows* (1); see *Union Lighterage Co.* v. *London Graving Dock Co.* (2); *Ray* v. *Hazeldine* (3); *Derry* v. *Sanders* (4) in the Court of Appeal. There have been many cases which have been decided to be exceptions to the general rule, and I have endeavoured, and I hope I have succeeded in the attempt, to extract from the decisions a sufficiently accurate description of the circumstances and considerations upon which these exceptions depend:—

1. Where the owner of a house and adjoining land expressly sells the house and with it an apparent easement, such as a right to light or a physically defined right of way, and at the same time sells the land, both purchasers being aware of the simultaneous conveyances, there is, in the conveyance of the land, a reservation of the right to the easement. If it were not so the express or implied grant of the apparent easement would be nugatory: *Allen* v. *Taylor*. (5)

2. If an agreement, by which a lessee of a continuous building or series of buildings assigns part of the same, cannot have effect given to its provisions without implying the reservation of a particular easement, such reservation will not be deemed to be in derogation of the assignor's grant but will be held to be impliedly excluded from the grant: *Russell* v. *Watts*. (6)

3. If the owner of two adjoining properties, A and B, grants to the tenant of A a tenancy from year to year with a right of way during his tenancy over B, and subsequently

(1) 12 Ch. D. 31.
(2) [1902] 2 Ch. 557.
(3) [1904] 2 Ch. 17.
(4) [1919] 1 K. B. 223.
(5) (1880) 16 Ch. D. 355.
(6) 10 App. Cas. 590.

leases B, the lease of B is subject to a reservation of the right of way which has ex hypothesi been granted to the tenant of A if it is shown that the lessee of B was aware of a long continued exercise of the right by the tenant of A: *Thomas* v. *Owen*. (1) It is not clear from the report of this case how the tenant of A obtained his right of way, but it is clear from the judgment of the Court delivered by Fry L.J. that the tenant of A had, before the lease of B, acquired from his landlord by grant express or implied the right of using the road in question. Fry L.J. points out (2) that the plaintiff and his predecessors in title had acquired the right to use the road as an easement of the farm occupied by him, and that no demise could be made of the soil of the road free from that right "without derogating from the grant to the plaintiff under which his then subsisting tenancy was constituted." See also *Westwood* v. *Heywood*. (3)

4. Where an owner executes contemporaneous conveyances of adjoining plots with the houses erected on them, and there exists a made road across the land of one plot to an entrance to the house on the other plot, and it is proved that the road was constructed for the use of both houses, there will be implied a grant in the one conveyance of a right to use the road and a corresponding reservation in the other conveyance: *Nicholls* v. *Nicholls*. (4) The decision of Russell J. in *Hansford* v. *Jago* (5) appears to me to depend upon the same considerations as the decision in *Nicholls* v. *Nicholls*. (4)

5. A similar exception arises for a similar reason where building leases are granted contemporaneously to different owners who undertake to build in accordance with a general plan which provides for the construction of a road for the convenient mutual use of the occupiers of each of the houses which are to be built in accordance with the plan. There is then implied in the lease of each of the plots a right of way over that part of the road which is on the other plots, and a corresponding reservation to the lessor of an easement so

(1) 20 Q. B. D. 225.
(2) 20 Q. B. D. 230.
(3) [1921] 2 Ch. 130.
(4) 81 L. T. 811.
(5) [1921] 1 Ch. 322.

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as to enable him to give effect to his grant of an easement to each of the lessees: *Cory* v. *Davies*. (1)

So far as I have been able to find, the exceptions to the rule in *Wheeldon* v. *Burrows* (2) have not been carried beyond those above stated. I think the defendant has failed to prove facts which would bring her case within any of these exceptions. For all we know there may have been a tenant of No. 30 before Mrs. White became a tenant of No. 28, and, if so, the leasehold owner could not derogate from his grant to that tenant by reserving a right of way for the benefit of Mrs. White across the back garden of No. 30. There was no building plan showing that the houses were originally built on a plan which indicated the intention that such a right was to come into existence. The county court judge, whose decision is final on all questions of fact, has come to the conclusion that there was not enough evidence to enable him to decide that the user of the alleged quasi-easement was otherwise than by the courtesy of the tenants of No. 30. In my judgment the learned judge was not justified, on the facts as found by him, in holding that Gilbert had, in assigning the lease of No. 30 in 1901, impliedly reserved for himself as lessee of No. 28 a right to use the way across the garden of No. 30 for the removal of dust and delivery of coal. The case is governed by the general rule laid down in *Wheeldon* v. *Burrows* (2) and is not within any of the recognized exceptions. For these reasons I agree with the judgment of the Divisonal Court, and this appeal must be dismissed.

SANKEY L.J. In this case it is important to ascertain the law and then to apply it to the facts. We start with the admitted principle that a man may not derogate from his grant. The rule about rights of way which arise from implication is simply this, that on a severance of two properties anything like a right of way, or any other easement which is used and which is reasonably necessary for the reasonable and comfortable use of the part granted is intended to be granted too. The principle is that the grantor is assumed to have

(1) [1923] 2 Ch. 95. (2) 12 Ch. D. 31.

intended that his grant shall be effectual: see per Bowen L.J. in *Bayley* v. *Great Western Ry. Co.* (1) The law is thus stated in Halsbury's Laws of England, vol. xi., p. 254, s. 511: "Upon the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent accommodations afforded by the part retained to the part granted which are of such a nature that they might form the subject matter of an easement, and which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owner of the entirety for the benefit of the part granted. This rule is founded upon the principle that a man shall not derogate from his grant. There is no corresponding implied reservation in favour of the grantor," (citing *Wheeldon* v. *Burrows* (2) and referring to other cases). If a decision has to be arrived at upon the documents only there is no exception to this rule. There may be cases however where the grantor or those claiming after and through him (hereinafter called the grantor) may show that the prima facie right of the grantee was restricted, in other words that the grant was limited, or, to put it from the opposite point of view, that there was an implied reservation in favour of the land retained by the grantor. In *Broomfield* v. *Williams* (3) A. L. Smith L.J. said: "When the cases of *Birmingham, Dudley and District Banking Co.* v. *Ross* (4) and *Myers* v. *Catterson* (5) are examined, it appears that the above statement of the law is not impugned, and that each of these cases was decided upon the ground that the grantor was able to show that this prima facie right of the grantee was limited or restricted; or, in other words, the grantor was able to show what was the implied obligation which he, in fact, undertook when he sold to the grantee." Lawyers have differed as to the nature of this right. Some refuse to recognize it as an implied reservation in favour of the grantor and prefer to regard it as an implied grant by the grantee

(1) (1884) 26 Ch. D. 434, 452, 453.
(2) 12 Ch. D. 31, 49.
(3) [1897] 1 Ch. 602, 613.
(4) (1888) 38 Ch. D. 295.
(5) (1889) 43 Ch. D. 470.

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back to the grantor, but however that may be, and in whatever category the right is to be placed, it undoubtedly exists and is an exception to the rule that a man may not derogate from his own grant. The most familiar example is the implied grant of a right of way of necessity. Another is where semi-detached houses built at the same time adjoining one another have a mutual right of support when they come into different ownership: *Richards* v. *Rose.* (1) Thesiger L.J. in giving judgment in *Wheeldon* v. *Burrows* (2) says, after referring to ways of necessity: "I do not dispute for a moment that there may be, and probably are, certain other exceptions." I do not think it possible, at any rate I propose to resist the dangerous ambition of trying, to lay down a rule which will cover all exceptions. It is impossible to foresee facts; all that can be said is that the onus is upon the grantor to establish the facts to prove that his case is an exception to the rule. In *Wheeldon* v. *Burrows* (3) he failed to do so. He called no evidence and was held not entitled to light for windows in a factory on the land retained overlooking the land alienated. In *Allen* v. *Taylor* (4) Sir George Jessel M.R. laid down the law in these words: "There can be no doubt that the law as laid down by *Palmer* v. *Fletcher* (5) is the law of the present day; that is, that where a man grants a house in which there are windows, neither he nor anybody claiming under him can stop up the windows or destroy the lights. That is based on the principle that a man shall not derogate from his own grant; and it makes no difference whether he grants the house simply as a house, or whether he grants the house with the windows or the lights thereto belonging. In both cases he grants with the apparent easements or quasi-easements. All that is now, I take it, settled law. I take it also that it is equally settled law that if a man who has a house and land grants the land first, reserving the house, the purchaser of the land can block up the windows of the house." In *Russell* v. *Watts* (6) the

(1) (1853) 9 Ex. 218.
(2) 12 Ch. D. 31, 49.
(3) 12 Ch. D. 31.
(4) 16 Ch. D. 355, 357.
(5) (1664) 1 Lev. 122; 1 Sid. 167, 227.
(6) 10 App. Cas. 590, 596.

House of Lords held that the grantor had in fact reserved an easement of support. Lord Selborne said: "My Lords, we start in this case with the general rule of English law, that a man cannot be prevented from darkening his neighbours' window lights by any act, otherwise lawful, done on his own land, unless light has been enjoyed through those windows for twenty years; and also with another general rule (exemplified in the case of *Wheeldon* v. *Burrows* (1)) that if a man entitled to a house with windows, however long enjoyed, sells and grants away the adjoining land without any condition, reservation, or other form of contract which can operate restrictively against the grantee, he is not at liberty to derogate from his own grant, so as to prevent any use, otherwise lawful, of the land granted, although the windows of his own house may be darkened thereby. It is manifest, however, that neither of these rules can be invoked in defence of any act contrary to the good faith of a particular contract." In *Thomas* v. *Owen* (2), where, it will be noted, *Wheeldon* v. *Burrows* (1) was not cited, the Court of Appeal made an exception in favour of a made and fenced lane running over the land granted as being a road subsisting visibly for the convenience of the plaintiff's, the grantor's, farm. Here it will be observed that the lane was actually on the land granted and visibly subsisting, unlike the windows which in *Wheeldon* v. *Burrows* (1) were on the land retained. In *Nicholls* v. *Nicholls* (3), rather a different case, where three houses left under a will were by agreement divided among three persons, Stirling J. said: "Although in general a way not being a way of necessity does not fall within this rule" —i.e. that ways of necessity pass by implication of law without words of grant—"still it is established by many cases that a formed road over one tenement to and for the apparent use of the other, does." In *Pwllbach Colliery Co.* v. *Woodman* (4) Lord Parker stated the general rule relating to these exceptions as follows: "The second class

(1) 12 Ch. D. 31.
(2) 20 Q. B. D. 225.
(3) 81 L. T. 811, 812.
(4) [1915] A. C. 634, 646.

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of cases in which easements may impliedly be created depends not upon the terms of the grant itself, but upon the circumstances under which the grant was made. The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is to be used." *Derry* v. *Sanders* (1) was complicated by reason of the fact that the right of way there claimed was in a manor, but it was held to have been extinguished upon the enfranchisement of the plaintiff's land without any reservation of the right being contained in the deed of enfranchisement. In *Hansford* v. *Jago* (2) Russell J. upheld an exception in favour of a right of way at the back of one of several cottages which was not in a made road, but was marked with worn tracks showing it was used as a back approach to each cottage. The way had been used by the various tenants to obtain access to their back doors, and over the way they could take the contents of their earth closets and cesspools when it became necessary to empty them. It was an offence under local by-laws to remove such contents through the cottages. Russell J. said (3): "The result is that even if I am wrong in thinking that there was an express grant of the right of way either by virtue of the use of the word 'appurtenances' in the conveyances or by virtue of the words read into the conveyances pursuant to s. 6 of the Conveyancing Act, 1881, I should still hold that the vendor of the four cottages must be taken to have granted to each of them the right to use the strip in the rear of the cottages as a way in the same manner as it was being enjoyed by the tenants of these cottages before and up to the date of the conveyances. That will involve implying in the conveyances such reservations or grants as may be appropriate to confer this common right." In *Westwood* v. *Heywood* (4) Astbury J. upheld an exception in favour of a water supply, saying: "Therefore under the

(1) [1919] 1 K. B. 223.
(2) [1921] 1 Ch. 322.
(3) [1921] 1 Ch. 342.
(4) [1921] 2 Ch. 130, 139.

rule in *Thomas* v. *Owen* (1), the defendant's subsequent tenancy agreement of 1911 must be read with an implied reservation of this right of water previously granted and assured to the Roxwell tenants." In *Cory* v. *Davies* (2) P. O. Lawrence J. in upholding a right of way over a road in front of houses in Halswell Terrace, Cardiff, said: "It is evident, however, from the judgment in *Wheeldon* v. *Burrows* (3), that there are exceptions to this general rule, and I am of opinion that the present case forms one of these exceptions."

The above cases establish the rule laid down in *Wheeldon* v. *Burrows* (3) and afford instances of exceptions to it. The question in the present case is: Has the defendant proved that the case is an exception to the general rule? Admittedly the right claimed is not for a way of necessity. Two periods of time may have to be looked at, first October 5, 1895, when the freeholder granted separate leases of No. 28 and No. 30 to H. J. Hawkins, and December 10, 1901, when No. 30 was assigned to Stevens, the plaintiff's predecessor in title, without any reservation of the right of way now claimed. What was the position of affairs at each of those dates? On October 5, 1895, it is obvious from the leases themselves that the houses were not yet finished, and there is no evidence that there was anything in the nature of a made way or even of any tracks. Neither is there any evidence that at this date there was any gate in the fence of No. 28 through which one could go to and so through the garden at the back of No. 30. On December 10, 1901, there is still no evidence of any made road or track, but there is evidence that there was a gate in the fence of No. 28 and evidence of the user of the way, but, according to the finding of the county court judge, "the evidence was not clear whether or not it was by arrangement with the occupant of No. 30."

In these circumstances I am of opinion that the defendant has not discharged the onus of showing that this case is an exception to the rule in *Wheeldon* v. *Burrows*. (3) In my

(1) 20 Q. B. D. 225, 230, 231. (2) [1923] 2 Ch. 95, 109.
(3) 12 Ch. D. 31.

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view the decision of the Divisional Court was right and this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Calvert Smith & Co.*

Solicitors for respondent: *John T. Lewis & Woods.*

W. H. G.

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April 19, 22.

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FROST *v.* WILKINS.

Election Law—Registration—Occupier of "business premises"—Director of limited Company—Room in Company's Premises let to Director—"Business" of Director—Representation of the People Act, 1918 (7 & 8 *Geo.* 5, *c.* 64), *s.* 1—*Representation of the People (Equal Franchise) Act*, 1928 (18 & 19 *Geo.* 5, *c.* 12), *s.* 1.

By an agreement in writing a limited company gave one of its directors the exclusive possession of a room in its premises at a yearly rent of 20*l.* The director occupied the room solely for the purpose of carrying out his duties as director:—

Held, (1.) that the room constituted "premises" within the meaning of s. 1, sub-s. 3, of the Representation of the People (Equal Franchise) Act, 1928; and (2.) (Scrutton L.J. dissenting) that it was occupied by the director for the purpose of his business within the meaning of the same sub-section, and that he thereby had the requisite business premises qualification within s. 1, sub-ss. 1 and 2, of the Act which entitled him to be on the register of voters.

APPEALS from Shoreditch and Clerkenwell County Courts under the Representation of the People Acts, 1918 and 1928.

FROST *v.* CASLON.

In this case A. H. Caslon had been for many years registered as an elector for the borough of Finsbury for the full parliamentary and local government franchise in respect of an occupation of 82 Chiswell Street. The registration was continued for 1929, but was then objected to by Albert James Frost on the ground that as to the parliamentary register Caslon did "not occupy the premises or any part thereof for the purpose of his business, trade or profession

within the meaning of the Representation of the People Acts, and did not do so during the qualifying period," and as to the local government register that "he did not occupy, as owner or tenant, the premises aforesaid, or any part thereof within the meaning of the Representation of the People Acts during the qualifying period."

By an agreement dated June, 1927, made between H. W. Caslon & Co., Ld., type founders, and A. H. Caslon, one room on the first floor of the company's premises, No. 82 Chiswell Street, was let by the company to A. H. Caslon at a clear yearly rental of 20*l.*, payable quarterly, to be used as an office only. That agreement, which gave A. H. Caslon an exclusive tenancy of the room, was still in force. A. H. Caslon was a director or employee of H. W. Caslon & Co., Ld., and it was said on his behalf that he occupied the room for the purpose of his business, profession or trade as a director or employee of the company.

In support of the objection to A. H. Caslon's name being retained on the register, it was contended that the occupation of the premises 82 Chiswell Street was by H. W. Caslon & Co., Ld., and that A. H. Caslon had no personal occupation of the premises.

The registration officer disallowed the objection, and on appeal his view was upheld by Judge Cluer of Shoreditch County Court.

The objector appealed.

FROST *v.* WILKINS.

In this case John Wilkins, who was a director of John Wilkins & Co., Ld., gilders, platers and silversmiths, of 231-243 St. John Street, was on the register of electors for the parliamentary borough of Finsbury, in respect of an occupation of business premises 231–243 St. John Street. By an agreement in writing dated in 1921, which was still in force, John Wilkins & Co., Ld., let to John Wilkins a room on the ground floor of 231–243 St. John Street at an inclusive rent of 25*l.*, payable quarterly. John Wilkins used the room not only as director of the said company, but

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also for his own private business. It was objected that he had no personal occupation of the room and was therefore not entitled to be on the register.

The registration officer disallowed the objection, and on appeal his view was upheld by Judge Rowlands of Clerkenwell County Court on the ground that Wilkins occupied the room not only for his work as director but likewise for his private business.

The objector appealed.

Sir Henry Slesser K.C. and *Arthur Henderson* for the appellant. The question turns on the construction of s. 1 of the Representation of the People (Equal Franchise) Act, 1928 (1), which is substituted for s. 1 of the Representation of the People Act, 1918. First, with regard to Caslon's case, it is submitted that he did not occupy the room "for the purpose of the business" of himself; he occupied it as director of the company and solely for its business. "Business" in the section has its ordinary signification—namely, a continuing series of transactions, and these were carried out by Caslon for the purpose of his company. There is no business of "directing" a company. The registration officer and county

(1) Representation of the People (Equal Franchise) Act, 1928, s. 1, sub-s. 1: "A person shall be entitled to be registered as a parliamentary elector for a constituency (other than a university constituency) if he or she is of full age and not subject to any legal incapacity; and (*a*) has the requisite residence qualification; or (*b*) has the requisite business premises qualification; or (*c*) is the husband or wife of a person entitled to be so registered in respect of a business premises qualification."

Sub-s. 2: "A person, in order to have the requisite residence qualification or business premises qualification for a constituency (*a*) must on the last day of the qualifying period be residing in premises in the constituency, or occupying business premises in the constituency, as the case may be; and (*b*) must during the whole of the qualifying period have resided in premises, or occupied business premises, as the case may be, in the constituency, or in another constituency within the same parliamentary borough or parliamentary county, or within a parliamentary borough or parliamentary county contiguous to that borough or county. . . . ."

Sub-s. 3: "The expression 'business premises' in this section means land or other premises of the yearly value of not less than 10*l.*, occupied for the purpose of the business, profession, or trade of the person to be registered."

court judge were therefore wrong in allowing Caslon's name to remain on the register.

With regard to the second case, in view of the finding of the county court judge, we cannot contend that Wilkins did not use the room for the purpose of his business, but it is submitted that the room did not constitute "premises" within the meaning of s. 1, sub-s. 3, of the Act of 1928. "Premises" mean the whole of a building and not a part. It is true that by s. 41 of the Representation of the People Act, 1918, a "dwelling-house" includes any part of a dwelling-house where that part is occupied separately as a dwelling-house; but there is no similar provision with regard to business premises. Between 1832 and 1878 unless premises were structurally severed they were not qualifying premises; but by s. 5 of the Parliamentary and Municipal Registration Act, 1878, "the terms 'house, warehouse, counting-house, shop, or other building' shall include any part of a house where that part is separately occupied for the purpose of any trade, business, or profession." That section, however, was repealed by the Representation of the People Act, 1918, and not re-enacted. Now, the expression is "land or other premises," and "premises" mean the whole building. Further, even if the room can be said to constitute "premises," there is no evidence that it was separately occupied. At the highest Wilkins can be called a business lodger only.

[They referred to *London and North Western Ry. Co.* v. *Buckmaster* (1); *Smith* v. *Lancaster* (2); and *Rochdale Canal Co.* v. *Brewster*. (3)

Cyril Atkinson K.C. and *Laskey* for the respondents were not called on as to "premises" and "occupation." The question then is, did Caslon occupy the room let to him for the purpose of his business, profession or trade? It is submitted that he did. His "business" was the carrying out of his duties as a director. Those duties are distinct from those of the company, and are many and varied. The director has many statutory duties to discharge with regard to the making of

(1) (1875) L. R. 10 Q. B. 444. (2) (1869) L. R. 5 C. P. 246.
(3) [1894] 2 Q. B. 852.

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annual returns and such like which if he omits to perform he is liable to penalties. Further, he has to work out the policy of the company, and that he does in his room. "Business" has a very wide signification; it means anything which is an occupation, as distinguished from a pleasure: see per Jessel M.R. in *Smith* v. *Anderson* (1), and per Lindley L.J. in *Rolls* v. *Miller*. (2) In an enabling Act such as this, which extends the franchise, the word should not be construed restrictively. A man may be carrying on a business although he is employed by some one else. A dentist is none the less carrying on his profession although he may be employed by a dental company.

Sir Henry Slesser K.C. in reply. The argument for the respondents involves this, that every male employee of a company can claim to be on the register if he has a room for which he pays a rent of the requisite amount to the company. That is an unreasonable view of the statute. The reasonable construction of s. 1, sub-s. 3, is that it refers to the substantial business carried on in the premises, and in Caslon's case that was the business of the company.

SCRUTTON L.J. These two appeals, which raise a question of some difficulty, come from two county courts. On the one point of difficulty the judges have differed, and there is also a difference of opinion in this Court. What I am about to say is therefore only the expression of my personal view.

First, I desire to say something about the way in which these cases come before the Court. I wish Parliament did not show such confidence in the Court of Appeal, for within the last twenty years or so, by a series of statutes dealing with some extremely contentious matters, it has, with the desire to avoid multiplicity of appeals, given an appeal direct to this Court. That has been done by the Workmen's Compensation Acts, which have provided an enormous mass of work; by the Agricultural Holdings Act, 1923; and now by the Representation of the People Acts. Parliament should remember that this Court is the hardest worked Court of Appeal in the world and is the only one which sits

(1) (1880) 15 Ch. D. 247, 258. (2) (1884) 27 Ch. D. 71, 88.

five days a week throughout the whole legal term; and Parliament might try the experiment of sending some of those appeals to the House of Lords, where the views expressed might be of help to the Court of Appeal.

The procedure under the Representation of the People Acts consists of a hearing by a registration officer from whose decision an appeal lies to the county court, and from that Court an appeal lies to this Court on matters of law. In the first of the two appeals before us it appears that the name of A. H. Caslon was on the preliminary list of voters submitted to the registration officer. Mr. Frost objected to it being on the list on the ground that A. H. Caslon did not occupy for the purpose of his business the premises in respect of which he was on the list, but no evidence was given in support of that contention. Thereupon, in my view, there should have been an end of the case. An objector who alleges facts but brings no evidence to support them should have his objection dismissed. The solicitor who appeared on behalf of A. H. Caslon made a statement of the facts in reply to questions put by the registration officer, who accepted that as sufficient. In my view this was wrong. Statements by an advocate whose knowledge of the facts is derived solely from information supplied by his client are not evidence. However, the solicitor's statement was accepted by the registration officer, who thereupon disallowed the objection. It then became the duty of the registration officer, under s. 29 of the First Schedule to the Representation of the People Act, 1918, and r. 4 of the County Court (Registration Appeals) Rules, 1918, to state the material facts which in his opinion had been established by the evidence, and forward this statement to the county court. The registration officer has not done that; he has not, as he ought to have done, stated what facts he found; and it is only because the general election is so near that we have not sent the cases back in order that the registration officer might comply with the statute and rules in this respect.

I come now to the substantial question in the first case. The business of H. W. Caslon & Co., Ld., who are type founders,

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is carried on at 82 Chiswell Street, and I have no doubt that the company pays large sums in respect of income tax. The wisdom of Parliament has not thought it necessary to confer a vote on limited companies, although they are heavily taxed —an instance of taxation without representation. However, the directors of the company have sought to correct this injustice, and accordingly, there appear on the register for 82 Chiswell Street, the names of seven persons—four directors and the wives of three of them. In the course of the argument Greer L.J. asked what was the principle underlying the Representation of the People Acts by which a business man's wife, who takes no part in the business of her husband, is given a vote for his business premises whereas a company which is heavily taxed is denied a vote. Any attempt to find a principle is beyond my power. As I have said, the names of four directors of this company and those of the wives of three of them appear on the register. Inquiry was made as to this, but the inquiry was concentrated on the case of A. H. Caslon, who it appeared had entered into an agreement by which he paid 20*l.* for an annual tenancy of a room at 82 Chiswell Street, let to him by the company. Careful provision is made in that agreement to ensure that the tenancy shall have no bad consequences to the company. For example, there is a provision that A. H. Caslon shall replace all broken glass in the room; there is a further provision that if a notice determining the tenancy is given "the landlord shall be at liberty to fix on the premises a notice advertising the same to be let"—a curious notice as to a room in a passage of the company's premises. In my view there was ample material upon which the registration officer could have held that this agreement of tenancy was not a genuine agreement; but the case proceeded throughout on the footing that it was. If a genuine agreement means one intended to have legal consequences, I have no doubt that this is a genuine agreement, for it was intended to have the legal consequence of giving a vote to A. H. Caslon. I do not think, however, that the clauses to which I have referred were ever intended to be enforced. The registration officer is not bound by pieces of paper; he

must ascertain and find the facts ; and the Court is not bound to enforce an agreement if it is satisfied that a great part of it is a mere sham. However, I deal with the case on the footing that the agreement is one which gives A. H. Caslon an exclusive tenancy of the room, entitling him to exclude every one, even his co-directors, who might desire to enter it.

The question then is, does the occupation of the room under that agreement entitle A. H. Caslon, and, incidentally, his wife, to a vote in respect of the premises ? The Representation of the People Acts, 1918 and 1928, have swept away most of the old technicalities which gave the Court so much trouble. By these Acts the first qualification for registration is what is called " residence qualification " ; that is residence within the constituency for a certain time. Residence qualification is about as wide as it can be. Then there is another qualification called " business premises qualification." Turning to see what the requisite " business qualification" is, I find that a person to be entitled to it " must during the whole of the qualifying period have . . . . occupied business premises . . . . in the constituency, or in another constituency within the same parliamentary borough or parliamentary county. . . . ." We might have been left to interpret the term " business premises " for ourselves, but Parliament has provided a definition—namely, " land or other premises of the yearly value of not less than 10*l*. occupied for the purpose of the business, profession, or trade of the person to be registered." On that it is said on the one side that the room in question is really occupied by the company ; everything done there of a business nature being done in carrying out the business of the company, or, if A. H. Caslon occupies it, he occupies it solely for the purpose of the business of which he is director. On the other hand it is said that the operation of carrying on the business of H. W. Caslon & Co., Ld., has another aspect, inasmuch as the business is done by A. H. Caslon in the exercise of his business, profession, or trade of a director. Thus, it is said that the business done in the room has two aspects—business done by the director for the company of which he is director, and

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business done by him as a director in order to earn his living as a director of the company. The case of the position of charwomen was put during the argument. Suppose H. W. Caslon & Co., Ld., let one of their rooms to a charwoman who occupied it for carrying on her trade of a charwoman —namely, for keeping in it the implements of her trade— would she come within the definition clause? Cases were also put of a dentist who was in the employment of a dental company, and of a managing clerk to a solicitor, each of them carrying on his profession in a room let to him in the same premises. Is the room occupied for the purpose of the profession of the dentist and managing clerk respectively? It is a difficult question. Looking at it from what I may call the common juryman's point of view, and knowing something about human nature, I do not think that in this legislation Parliament was thinking about the trade or occupation of a man who was carrying on the business of another. In my opinion it was thinking about the substantial business that was carried on in the room—namely, the business of the employer—and was not thinking of, and did not use words to cover, the possible aspect of an employee working for reward, who might be said to be carrying on his trade. In other words Parliament was thinking of the trade of the person for whom it was carried on. I have hesitated for some time, and I have come to the conclusion that the view on this point taken by Judge Rowlands was right and the view taken by Judge Cluer was wrong. Therefore in the case of A. H. Caslon I should allow the appeal and say that he was not entitled to be on the register.

In the second case the question is not quite the same. Wilkins, who is managing director of a company carrying on business as gilders, platers and silversmiths, is a man with many other interests; he is the owner of a large amount of property, and it is found that, besides the business he transacts in the room as director of the company, he carries on what is practically the business or trade of an estate agent. The county court judge, who has found that as a fact, has held that Wilkins occupies the room for the purpose

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among others, of a business or trade which is not the business or trade of the company, his employers. In those circumstances I think, and indeed it was not argued otherwise, that Wilkins is entitled to a vote providing he satisfies the other necessary conditions.

In Caslon's case the two points with which I am now about to deal were not argued; in Wilkins' case they were. It was said first that one room does not constitute "premises" because it is part of premises, and the Act by the word "premises" means the whole structure and not a part of it. The second point is that in any event no sufficient occupation of this one room was shown. Whatever may have been the case in the early days of the parliamentary franchise, when there were great fights over the question whether a room in a house could constitute premises or a tenement, in my view the course of legislation has taken us a long way beyond that. Since the passing of the Rent Restriction Acts, we have become familiar with the fact that one dwelling-house may include a number of others, and with the idea that premises within premises may still be premises. In dealing with this point I can see no reason why a room separately occupied should cease to be "premises" because it is contained within the structure of a larger building which is also "premises." My view is that expressed in Fraser's Representation of the People Acts, 2nd ed., where it is said (p. 50) that "the words 'any land or premises' are very wide, and will include any piece of land or any kind of structure or building of whatsoever kind, or any part thereof, provided it is capable of being 'occupied' within the meaning of s. 3."

The remaining point was that this room could not be occupied, which I take to be an allegation that it was not so structurally severed from the rest of the premises as to be capable of separate occupation. On this point I should have been glad if the registration officer had found the facts. But, as far as I can understand, there was evidence upon which the registration officer and the county court judge could find that this room was so structurally severed as to be capable of separate occupation.

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For these reasons I think the appeal in Wilkins' case should be dismissed.

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GREER L.J. I regret to find myself in disagreement with Scrutton L.J. in a case where no appeal lies from this Court; but although the question in Caslon's case is not free from difficulty I have formed a definite opinion as to the construction to be given to the words of s. 1 of the Act of 1928, which is substituted for s. 1 of the Act of 1918. In my judgment the section preserves in one instance an occupying franchise—namely, that of a person who is in business or who exercises a profession or trade, and occupies premises for that purpose. I think the intention was that any person who can say: "I am a man of business, or I am exercising a profession or a trade, and I am occupying premises for the purpose of enabling me to do the things which are necessary to be done in carrying on my business or exercising my profession or trade," should be entitled to be put on the register of voters in respect of that occupation. Parliament has by this preserved what was a common feature of parliamentary elections until recent times—namely, the right of a man to more than one vote. What was the intention of individual members of Parliament it is useless to speculate; some may have thought that the section meant one thing, others that it meant another. What we have to do is to interpret the words of the section as it appears in the statute. I cannot read the words of s. 1, sub-s. 2 (*b*) and sub-s. 3, as meaning anything but this, that, if a man, who can properly describe himself as having a business, is in genuine occupation of that which is in law "premises," he is entitled to a vote in respect of those premises in addition to having a residential vote in another constituency. I ask myself what would Mr. Caslon reply to this question if he were asked before going to his daily work: "What is your business?" I think he would answer, without any misuse of language: "My business is that of managing director of a type foundry business, and I am going to the office which I have rented from my company at 20*l.* and there do that which is my business."

Test the question with reference to the frame in which the word "business" is used in the collocation "business, profession, or trade." I think that I am entitled to assume that Parliament intended to put a business man, a man exercising a business calling, on the same footing as a man exercising a profession. If a dental surgeon occupied a room for which he paid rent and of which he held the key, fitting or extracting teeth, he would be none the less exercising his profession in the room because he was the managing director of a dental company and because the remuneration paid by patients went to the company and not to himself, he himself being remunerated by a salary or by a commission on the company's total receipts. So in the case of Caslon, I think the registration officer was right in disallowing the objection. The dictionaries support his conclusion. In *Smith* v. *Anderson* (1) Jessel M.R. quoted from the Imperial Dictionary, which defined "business" thus: "Business, employment; that which occupies the time and attention and labour of men for the purpose of profit or improvement." Again in *Rolls* v. *Miller* (2) Lindley L.J. said this (3): "When we look into the dictionaries as to the meaning of the word 'business,' I do not think they throw much light upon it. The word means almost anything which is an occupation, as distinguished from a pleasure—anything which is an occupation or duty which requires attention is a business." Such aid as we can get thus supports the view I take of the construction of this section. There may be many cases, I agree, in which it would be right for the tribunal of fact to say that the agreement of tenancy put forward is not a real agreement, and by that I do not mean that the tribunal of fact can dispose of the agreement by saying that the motive of its execution was to get the right to vote. That is a perfectly good motive if carried out by a document which is meant by both parties to regulate their mutual rights. If the tribunal were satisfied that the agreement was a mere sham, the registration officer would be entitled to say: "This

(1) 15 Ch. D. 247, 258. (2) 27 Ch. D. 71.
(3) 27 Ch. D. 88.

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Greer L.J.

is not a real agreement, and it is a mere pretence to say that the director is the tenant." The registration officer has not said so in this case and, indeed, when the case was argued before the county court judge it was conceded that the tenancy granted to Caslon was a genuine tenancy, and we must therefore decide the case on that basis. Personally I am not at all afraid of the suggested army of charwomen and office boys who by our decision might conceivably be put upon the register for the purpose of enabling a company to obtain a larger number of votes. I doubt very much whether any company would run the risk of ridicule if it pretended to give exclusive occupation of premises to office boys or charwomen. On the other hand, I think some useful purpose may be served by the right which I think was given by this Act to companies to secure at any rate some form of representation by granting tenancy agreements to those persons who can reasonably speak for the company and exercise votes in its interests. With this question of policy, however, we are not concerned; our duty is merely to interpret the section, and for my part I think that the county court judge was right as to its meaning, and therefore, in my opinion, the appeal should be dismissed.

With regard to Wilkins' case, I agree with Scrutton L.J. that the appeal should be dismissed for the reasons he has given. I only desire to recall attention to the passage in Fraser's Representation of the People Acts, 2nd ed., p. 50, where it is said that " the words, ' any land or other premises ' are very wide, and will include any piece of land or any kind of structure or building of whatsoever kind, or any part thereof, provided it is capable of being 'occupied' within the meaning of s. 3." I think the word " premises " was intentionally used by Parliament. It is wide enough to cover the rooms occupied by Caslon and Wilkins respectively.

RUSSELL L.J. These appeals raise three questions under s. 1 of the Representation of the People Act, 1918, as amended by s. 1 of the Act of 1928, and we have to deal with them upon the footing that the tenancy agreements are

bona fide documents representing bona fide transactions, that is to say, we must treat Caslon and Wilkins as paying rent of a sufficient amount as the tenants of the rooms and that as such tenants they had exclusive occupation of those rooms. The question to be answered is this: Had Caslon and Wilkins during the whole of the qualifying period occupied premises for the purpose of their business within the meaning of s. 1? Three reasons were urged by Sir Henry Slesser for answering that question in the negative: first, that there was no occupation of the premises within the meaning of the section; secondly, that the rooms did not constitute "premises"; and thirdly, that the rooms were not occupied for the purpose of the business of Caslon or Wilkins but were occupied by them for the purposes of the company's business. As regards the first of those reasons I merely wish to say that it is impossible to accept it if we treat, as we have to treat, the tenancy agreement as a genuine document. As regards the second reason, I only add this to what has already been said, that the statute uses the word "premises" in a general sense and intends thereby to include the case of a single room. Turning to s. 3 of the Act of 1918, which deals with the local government franchise, I find that it provides that a man shall be entitled to be registered who "is on the last day of the qualifying period occupying, as owner or tenant, any land or premises." To that enactment there are two provisos, the second of which says that "for the purposes of this section the word tenant shall include a person who occupies a room or rooms as a lodger only where such room or rooms are let to him in an unfurnished state." It thus appears that a lodger is a tenant occupying "any land or premises" if the rooms are let to him unfurnished. "Premises" in the Act thus include a room or rooms.

I come now to the third point which has occasioned most difficulty. Sect. 1 appears to me to provide two qualifications as a parliamentary elector, first, a qualification by reference to where the person lives, and secondly, a qualification by reference to where he works. Those are called respectively "residence qualification" and "business premises qualification."

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Sub-s. 3, which defines "business premises," requires that they shall be "occupied for the purpose of the business, profession, or trade of the person to be registered"; and I can find nothing in the Act to prevent me giving to the word "business" one of its ordinary meanings—namely, work or occupation. In Caslon's case the question seems to resolve itself into this: Was the particular room occupied for the purpose of the business or work of Caslon? In my opinion it was. Caslon had the exclusive occupation of the room for the purpose of enabling him to do his work. What was his work? It was the work of assisting in the direction and management of the affairs of the company, and that work did not cease to be his business because it involved management of the company. I am unable to ascertain the intention of the Legislature except by reading the words it has used, and, looking at those words, I am unable to find in them any reason for departing from their ordinary meaning. Treating the tenancy agreements as genuine and not as bogus documents, I come to the conclusion that both respondents are within the provisions of s. 1 as persons each of whom occupies premises for the purpose of his business, profession, or trade. I agree with Greer L.J. that both appeals should be dismissed.

Appeals dismissed.

Solicitors for appellant: *Kenneth Brown, Baker, Baker.*
Solicitors for respondents: *Vivash Robinson & Co.*

J. S. H.

CARLTON HALL CLUB, LIMITED *v.* LAURENCE.

1929
Jan. 21, 22.

Gaming—Money knowingly lent for—Cheque as Security—Action on Contract of Loan—Legality of Consideration—Maintainability of Action—Gaming Act, 1710 (9 *Anne*, *c.* 19), *s.* 1—*Gaming Act*, 1835 (5 & 6 *Will.* 4, *c.* 41), *s.* 1.

Money lent in England on a security with a view to its being used by the borrower in playing here a game of cards for money cannot be recovered in an English Court.

Young v. Moore (1757) 2 Wils. K. B. 67; *Applegarth* v. *Colley* (1842) 10 M. & W. 723; and *Moulis* v. *Owen* [1907] 1 K. B. 746 followed.

Saxby v. *Fulton* [1909] 2 K. B. 208 and *Quarrier* v. *Colston* (1842) 1 Ph. 147 considered.

Appeal from Marylebone County Court.

The plaintiffs, the Carlton Hall Club, Ld., were the proprietors of premises at 177 Maida Vale, London, W., which they used and provided for the purposes of a proprietary club known as the Carlton Hall Club. The club consisted of about 400 elected members of both sexes, who met for social purposes and played cards, billiards, and other games. The plaintiffs supplied to members who desired to play games for money counters called "chips," representing the sums marked upon them, the members giving to the plaintiffs cheques for the sums represented by the chips which they used. On May 6, 1924, the defendant, Francis Harold Laurence, of West Hampstead, who was a member of the club, played poker and snooker at the club's premises, and the plaintiffs, by a Mr. Sadler, their managing director, lent the defendant 18*l.* in "chips" and 2*l.* in cash, receiving from the defendant a cheque for 20*l.* On May 8, 1924, the defendant played poker, and the plaintiffs lent him a further sum of 8*l.* 7*s.* 3*d.* in "chips," receiving from him a cheque for that amount.

The plaintiffs brought an action on a specially indorsed writ against the defendant in the High Court, claiming the amount of these advances—namely, 28*l.* 7*s.* 3*d.*—as money due under an agreement made on the above dates, and the action was remitted to be tried in the county court.

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The defendant alleged that the money claimed by the plaintiffs was knowingly lent by them to him, at least as to part of it, for the purpose of gaming, that the consideration and the agreement in respect of which it was given were void and illegal under the Gaming Act, 1710, s. 1 (1), and the Gaming Act, 1835, s. 1 (1), and that the action was not maintainable.

The county court judge, having heard the evidence, found as facts that part of the money lent by the plaintiffs to the defendant was lent to the knowledge of the plaintiffs for the purpose of playing cards, that part of the money was used by the defendant in playing cards and part in playing snooker, and that part—namely, 2*l.*—was advanced in cash; and he held that the plaintiffs were entitled to recover, and gave judgment in their favour for 28*l.* 7*s.* 3*d.* with costs.

The defendant appealed.

(1) The Gaming Act, 1710, provides:—

Sect. 1: "All notes, bills, bonds, judgments, mortgages or other securities or conveyances whatsoever, given, granted, drawn or entered into, or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities shall be for any money, or other valuable thing whatsoever, won by gaming or playing at cards, dice, tables, tennis, bowls or other game or games whatsoever, or by betting on the sides or hands of such as do game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent, or advanced for such gaming or betting as aforesaid, or lent or advanced at the time and place of such play, to any person or persons so gaming or betting as aforesaid, or that shall during such play, so play or bet, shall be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever: . . . ."

The Gaming Act, 1835, provides:—

Sect. 1: ". . . . So much of the herein-before recited Acts [one of which is the above-mentioned Act of 1710] as enacts that any note, bill, or mortgage shall be absolutely void, shall be and the same is hereby repealed; but nevertheless every note, bill, or mortgage which if this Act had not been passed would . . . . have been absolutely void, shall be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration, and the said several Acts shall have the same force and effect which they would respectively have had if instead of enacting that any such note, bill or mortgage should be absolutely void, such Acts had respectively provided that every such note, bill, or mortgage should be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration. . . . ."

Martin O'Connor (*G. L. Hardy* with him) for the defendant, appellant. The county court judge was wrong in holding that money knowingly lent in this country by the plaintiffs to the defendant for the purpose of gaming in this country was recoverable in the Courts of this country. The Gaming Act, 1710, s. 1 (1), provides (inter alia) that all notes, bills, mortgages, or other securities given by any person or persons where the sole or any part of the consideration of such securities shall be for the reimbursing or repaying of any money knowingly lent or advanced for gaming or betting shall be utterly void, frustrate and of none effect. The Gaming Act, 1835, s. 1 (1), provides that every note bill or mortgage, which by the section first above mentioned would have been absolutely void, shall be deemed and taken to have been made, given or executed for an illegal consideration. Thus, the earlier of these sections expressly provided that the security for a gaming debt shall be void, and the later of them expressly provides that it shall be deemed to be illegal. On the true construction of these sections, however, apart from authority, they mean that not only the security, but also the consideration, that is to say the loan of the money, shall be void or illegal. The sections would be inconsistent with themselves if, while rendering the security void or illegal, they permitted an action to be brought on the consideration in respect of which the security was given. This view is borne out by the authorities. In *Young* v. *Moore* (2) it was held that as the Act of 1710 made void all securities for money won at or lent for play, a fortiori did it make void all contracts for money so won or lent. In *M'Kinnell* v. *Robinson* (3) it was held that under the two Acts money lent for the purpose of gaming and of playing with at an illegal game cannot be recovered back. In *Applegarth* v. *Colley* (4) it was laid down that the Acts avoided not only the security for the gaming debt, but the contract itself. In *Moulis* v. *Owen* (5), where the defendant gave the plaintiff in a foreign

(1) See note (1) ante, p. 154.
(2) 2 Wils. K. B. 67.
(3) (1838) 3 M. & W. 434.
(4) (1842) 10 M. & W. 723.
(5) [1907] 1 K. B. 746.

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country a cheque drawn by him on an English bank for money lent by the plaintiff to the defendant to play a game which was legal in that country, but illegal in England, it was held by the Court of Appeal, Moulton L.J. dissenting, that as the transaction was governed by English law, the cheque was given for an illegal consideration and could not be sued upon. In *Ex parte Pyke. In re Lister* (1) it was judicially declared that money lent to enable the borrower to make a bet was lent on an illegal consideration and could not be recovered. Among the cases which may be cited on behalf of the plaintiffs are *Barjeau* v. *Walmsley* (2); *Robinson* v. *Bland* (3); and *Quarrier* v. *Colston.* (4) In *Barjeau* v. *Walmsley* (2) it was no doubt held that a loan of money to play with in England was not void, but that case was described by Wilmot J. in the case next mentioned as a fraud upon the Act. *Robinson* v. *Bland* (3) is distinguishable from the present case, for there the gaming debt which was held to be recoverable in this country had been won in a country where it was not illegal. *Quarrier* v. *Colston* (4) is distinguishable on the same ground, the money there having been lent for the purpose of gambling in a country where the practice was not illegal. The cases of *Saxby* v. *Fulton* (5) and *Société Anonyme des Grands Etablissements du Touquet Paris-Plage* v. *Baumgart* (6), on which the county court judge relied, are also distinguishable on the same ground. In *Saxby* v. *Fulton* (5), however, Kennedy L.J. approved of *Young* v. *Moore* (7) and *Applegarth* v. *Colley* (8), but thought they were not conclusive where the contract and the security were alike legal in the country where the contract was made. In the case of *In re O'Shea, Ex parte Lancaster* (9) the debt which was held to be provable in bankruptcy was in respect of a loan, not for the purpose of enabling the borrower to bet, but of repaying a bet previously lost. The authorities taken as a whole show that where in this country a security

(1) (1878) 8 Ch. D. 754.
(2) (1746) 2 Str. 1249.
(3) (1759-60) 1 W. Bl. 234, 256.
(4) 1 Ph. 147.
(5) [1909] 2 K. B. 208.
(6) [1927] W. N. 78; 96 L. J. (K. B.) 789.
(7) 2 Wils. K. B. 67.
(8) (1842) 10 M. & W. 723.
(9) [1911] 2 K. B. 981.

is given for the repayment of money lent for the purpose of gaming, not only is the security void and illegal, but the contract in respect of which it is given is also void and illegal. In the present case the cheque in question was given for a sum of money lent for gaming, and not only the cheque, but also the consideration is void and unenforceable in this country.

Gilbert Beyfus (*A. S. Diamond* with him) for the plaintiffs, respondents. The county court judge rightly decided that the plaintiffs were entitled to maintain this action against the defendant. The plaintiffs admit that the cheque given to them by the defendant as a security for the repayment of the money which they lent to him for gaming was void under the Gaming Act, 1710, s. 1, and that it must be taken to have been given for an illegal consideration under the Gaming Act, 1835, s. 1, and therefore that they could not maintain an action against the defendant upon the cheque. This action, however, is not brought upon the cheque, but upon the contract of loan for the recovery of the money lent which constituted the consideration moving from the plaintiffs, and the only question is whether the enactments referred to render that consideration and the contract invalid as well as the security. It is submitted that the Acts have not that effect and that the action is therefore maintainable. Under the Act of 1710 there were express decisions that a loan of money for the purpose of gaming, as distinct from the security for the loan, was not void but was valid and enforceable. In *Barjeau* v. *Walmsley* (1) and *Wettenhall* v. *Wood* (2) it was held that money lent for that purpose in England could be recovered, and in *Robinson* v. *Bland* (3) it was held by Lord Mansfield C.J. that a gaming debt won in France was recoverable in this country. The Gaming Act, 1835, was passed not for the purpose of increasing the stringency of the Act of 1710, but on the contrary for the purpose of relaxing its operation upon persons holding securities for gaming debts, by substituting for the provision that the security

(1) 2 Str. 1249. (2) (1793) 1 Esp. 18.
(3) (1759-60) 1 W. Bl. 234, 256.

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should be absolutely void a provision that it should be deemed to have been given for an illegal consideration, thus enabling a bona fide holder of the security to rebut the presumption of illegality and to enforce the security: see *Sutters* v. *Briggs* (1) and *Saxby* v. *Fulton*. (2) Since the passing of the Act of 1835 there have been other express decisions that a gaming contract is valid and enforceable. Thus, in *Applegarth* v. *Colley* (3) it was held that a contract for the payment of money on the result of a horse race was not illegal. In *Quarrier* v. *Colston* (4), where money was lent on a security for the purpose of playing in a foreign country a game which was not illegal there, though illegal in this country, it was held by Lyndhurst L.C. that the money was recoverable in this country. That case affirmed the older cases already mentioned which were decided before the Act of 1835. In *M'Kinnell* v. *Robinson* (5) it was no doubt held that money lent for playing the game of hazard could not be recovered back, but as hazard does not appear to be an illegal game that case has no bearing upon the present question. The case of *Moulis* v. *Owen* (6) referred to on behalf of the defendant is distinguishable from the present case, because there the action was upon the security and not upon the consideration. The decision in that case does not imply that an action could not have been maintained upon the consideration, but on the contrary it approves *Robinson* v. *Bland* (7), where it was held that such an action was maintainable. In *Saxby* v. *Fulton* (2) it was held by the Court of Appeal that money lent in a foreign country to be used by the borrower for playing a game not illegal by the law of that country might be recovered in the courts of this country. Buckley L.J. there dealt with *Moulis* v. *Owen* (6), and said with reference to a loan of money in a foreign country for the purpose of gaming that the Acts did not make the contract void. In *Société Anonyme des Grands Etablissements du Touquet Paris-Plage* v. *Baumgart* (8) it was held by

(1) [1922] 1 A. C. 1, 13.
(2) [1909] 2 K. B. 208, 229.
(3) 10 M. & W. 723.
(4) 1 Ph. 147.
(5) 3 M. & W. 434.
(6) [1907] 1 K. B. 746.
(7) (1759–60) 1 W. Bl. 234, 256.
(8) [1927] W. N. 78; 96 L. J. (K. B.) 789.

Shearman J. that where a person lends money to another in a foreign country for the purpose of playing a game not illegal by the law of that country, and receives from him a cheque for the amount, the lender, though not entitled to sue here on the cheque, may sue here on the loan. In the cases in which the question has arisen whether, on a loan of money for the purpose of gaming, an action could be brought upon the consideration as distinct from the security, the actual decision has always been that the action could be brought upon the consideration. The argument that the invalidity or illegality of the security renders the consideration invalid or illegal has not found favour with the Courts. It is true that in some of these cases, and more particularly in *Applegarth* v. *Colley* (1) and *Saxby* v. *Fulton* (2), observations are to be found which seem to imply that the statutes avoid the contract as well as the security and that the consideration cannot be sued upon, but these observations were unnecessary for the decision of the cases in which they were made and should be treated as mere obiter dicta. If in the present case the plaintiffs had not taken a cheque or other security from the defendant the case would have been outside the Acts and the defendant would have had no defence to the action, and the mere fact that the defendant gave a cheque cannot make any difference. In some of the cases in which it was held that an action could be brought upon the consideration the contract of loan was no doubt entered into in a foreign country where the game for which the money was lent happened to be lawful, but no distinction has ever been successfully drawn or can be drawn for this purpose between a contract made abroad and a contract made in this country.

O'Connor was not called upon to reply.

SHEARMAN J. In this case the plaintiffs are a proprietary club in this country consisting of elected members, who meet for social purposes and play various games including bridge, poker and snooker, and the defendant is a member of the club. The defendant borrowed from the plaintiffs certain

(1) 10 M. & W. 723. (2) [1909] 2 K. B. 208.

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sums of money for the purpose of using them, to the knowledge of the plaintiffs, in playing certain of these games or in paying losses incurred in playing these games, and he gave to the plaintiffs cheques for the amount borrowed.

The plaintiffs have brought this action to recover the amount of these advances. Although the defendant gave cheques for the amount claimed the plaintiffs have not brought an action upon the cheques for the good and well known reason that all securities for money knowingly lent for gaming in this country are avoided by the Gaming Acts. Actions of this kind are seldom brought in the English Courts, and when they are brought judgment is generally recovered under Order XIV., so that there is no official report of the judicial pronouncement; but in the present instance it is necessary to try the action in Court.

The question to be determined, which apparently has not yet been completely and convincingly decided, is whether, when the money has been advanced in this country, the statutes not only avoid the security but also avoid the consideration and render it incapable of recovery. The relevant statute is the Gaming Act, 1710, and the only part of it which it is necessary to consider is s. 1, which provides (inter alia) that "all notes, bills . . . . mortgages or other securities or conveyances whatsoever, given . . . . or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities shall be for any money . . . . won by gaming or playing at cards . . . . or for the reimbursing or repaying any money knowingly lent, or advanced for such gaming or betting as aforesaid, or lent or advanced at the time and place of such play to any person or persons so gaming or betting as aforesaid . . . . shall be utterly void, frustrate, and of none effect . . . ." In construing a statute it is always desirable to consider what meaning should be given to it when its language is left undisturbed. It seems to me that the section to which I have referred would be a somewhat nonsensical enactment if it were to be taken as meaning that the creditor can fall back upon the consideration for the security and

by so doing perhaps get a better security than he would otherwise have. That view of the section did not, however, commend itself to the judges who decided the three early cases of *Barjeau* v. *Walmsley* (1); *Wettenhall* v. *Wood* (2); and *Robinson* v. *Bland* (3), in which it was held that the statute avoided the security only and not the consideration. On the other hand, in the old case of *Young* v. *Moore* (4) the decision was to the opposite effect. The balance of these older authorities was thus against the view that the Act of 1710 avoided the consideration, and the law remained in that state for a considerable time. Then came the Gaming Act, 1835, s. 1 of which enacts that every note, bill or mortgage which by the Act of 1710 would have been absolutely void "shall be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration." I do not think that that section has much bearing upon this matter, except perhaps that it may afford some ground for an argument as to the presumable intention of the Legislature. It is clear that the object of that section is not to intensify the disabilities of the person who has borrowed the money, but rather to provide for the relief of a third party who has in good faith become the holder of the security given for the loan. The real question is what is the meaning of the earlier Act of 1710.

In 1842, seven years after the passing of the Act of 1835, the case of *Applegarth* v. *Colley* (5) was decided, in which it was said that it would be nonsensical to hold that the Legislature intended that the security should be bad, but that the consideration should be enforceable. If the conclusion arrived at in that case is right, it enables the defendant to succeed in an action for the recovery of money advanced for the purpose of being used in playing an unlawful game. About the same time as *Applegarth* v. *Colley* (5) the case of *Quarrier* v. *Colston* (6) was decided. That was an action on the consideration for money advanced on a security in a foreign country for the purpose of playing games which,

(1) 2 Str. 1249.
(2) 1 Esp. 18.
(3) 1 W. Bl. 234, 256.
(4) 2 Wils. K. B. 67.
(5) 10 M. & W. 723.
(6) 1 Ph. 147.

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though they were not forbidden by the laws of that country, were illegal in this country, and it was there held that the action was maintainable. The argument there was that though the statutes prevented the lender from suing on the security in England they did not prevent him from suing on the consideration. Since that case was decided, there has been a succession of cases arising out of advances of money for gaming in other countries, and in all these cases the contention has been put forward that the advances were for playing games which were illegal only in this country, and that therefore *Applegarth* v. *Colley* (1) did not apply. It is indeed a very formidable argument which counsel for the respondent founds upon these cases—namely, that they entitle him to say that an action may be brought upon the consideration although the game is illegal in this country and the security cannot be sued upon here. If that argument is valid, it conflicts with *Applegarth* v. *Colley* (1), and that case cannot be regarded as sound in law.

I do not intend to deal with each one of the multitude of cases that have been brought to our notice, but only with the more important of them. In 1907 the case of *Moulis* v. *Owen* (2) came before the Court of Appeal. That was a case in which the defendant gave to the plaintiff in a foreign country a cheque drawn by him on an English bank partly in payment of money lent by the plaintiff to the defendant to enable the defendant to play baccarat in a club in the foreign country, by the law of which baccarat was not an illegal game. Baccarat is an illegal game in this country, and it is clear that, by the Act of 1710, if a person borrows money to enable him to play an illegal game, then not only is the security unenforceable, but the money is irrecoverable. In *Moulis* v. *Owen* (2), though the main question was whether an action could be maintained upon the security, the question whether the consideration was also unenforceable was discussed at great length. Fletcher Moulton L.J., in a dissenting judgment, held that though the statutes avoided securities for gaming debts, yet they did not avoid the consideration

(1) 10 M. & W. 723.

(2) [1907] 1 K. B. 746.

and that the plaintiff was entitled to succeed. The other two members of the Court, however, took the other view, that *Applegarth* v. *Colley* (1) and the line of authorities which follow it were to be regarded as binding decisions. After that the case of *Saxby* v. *Fulton* (2) was heard and decided by the Court of Appeal. In the course of his judgment in that case Buckley L.J. expressed the opinion, which was not that of the Court as a whole, that the statute of Anne did not avoid the consideration. On the other hand, Kennedy L.J., though he did not in terms express the contrary view, referred to *Moulis* v. *Owen* (3), and also said (4): "In the considered judgment of the Court of Exchequer in *Applegarth* v. *Colley* (1) it was pointed out, with reference to the Act of 1835, that there was great difficulty in the way of holding that the consideration could be sued upon when the security admittedly could not. I should be very slow in venturing to dissent from the view expressed by that very strong Court, especially as they were approving of the view taken by the Court of Common Pleas in *Young* v. *Moore*. (5) But those judgments related only to transactions within this country to which the Gaming Acts apply; they cannot be conclusive authorities where the contract itself and the giving of a security are alike legal in the country where the contract was made."

In the case of *Société Anonyme des Grands Etablissements du Touquet Paris-Plage* v. *Baumgart* (6), which was another case of foreign gaming, I delivered a judgment in which I followed *Quarrier* v. *Colston* (**7**), and held that where persons lent money to another for the purpose of paying debts incurred in a foreign country by playing games which were not illegal by the law of that country, but would have been illegal if played in England, and received a cheque for the amount, though the lenders could not sue upon the cheque in England, they could sue here upon the consideration.

(1) 10 M. & W. 723.
(2) [1909] 2 K. B. 208.
(3) [1907] 1 K. B. 746.
(4) [1909] 2 K. B. 234.
(5) 2 Wils. K. B. 67.
(6) [1927] W. N. 78; 96 L. J. (K.B.) 789.
(7) 1 Ph. 147.

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Shearman J.

Having regard to the cases as a whole in regard to claims for money lent for the purpose of playing a game which is unlawful in this country, one finds that the law is in this curious condition: that where the game is played in a foreign country in which it is lawful then the decisions on foreign gaming apply and the money can be sued for in the courts of this country, but where the game is to be played in this country the weight of opinion is in favour of the view that the money cannot be sued for here because the statute of Anne avoids not only the security but by implication the consideration also. This state of the authorities is not very satisfactory, but the Court must follow those of them which appear to be most applicable to the case before it, and in the present case I think we are bound by the view of the majority of the Court of Appeal in *Moulis* v. *Owen*. (1)

ACTON J. I agree and have nothing to add.

Appeal allowed.

Solicitors for appellant: *S. Myers & Son.*

Solicitors for respondent: *Isadore Goldman & Son.*

(1) [1907] 1 K. B. 746.

J. R.

KIRKBY *v.* MINTY.

1929
April 12, 15.

Local Government—Stage Carriage—Overloading—Prosecution without Order of Commissioners of Inland Revenue—Competency—Railway Passenger Duty Act, 1842 (5 & 6 *Vict. c.* 79), *ss.* 13, 24—*Inland Revenue Regulation Act*, 1890 (53 & 54 *Vict. c.* 21), *s.* 21.

An information was preferred by a police officer against the conductor of a motor omnibus alleging that he had allowed the omnibus to carry at one time a greater number of passengers than it had been constructed to carry, contrary to s. 13 of the Railway Passenger Duty Act, 1842 :—

Held, that the prosecution was not a proceeding for the recovery of a fine or penalty under an Act relating to inland revenue within s. 21, sub-s. 1, of the Inland Revenue Regulation Act, 1890, and that it could, therefore, lawfully be commenced without an order of the Commissioners of Inland Revenue.

Per Lord Hewart C.J. Such a prosecution is a "proceeding on information or complaint of an officer of the peace for recovery of a fine or penalty imposed in relation to an offence against any law of excise" within s. 21, sub-s. 2, of the Inland Revenue Regulation Act, 1890.

Observations on proof of the overloading of a stage carriage.

CASE stated by justices.

The respondent, Alfred John Minty, Superintendent of Police at Doncaster, preferred an information under s. 15 of the Railway Passenger Duty Act, 1842, before the Lower Strafforth and Tickhill (Doncaster) justices, alleging that the appellant, William Joseph Kirkby, an omnibus conductor, had on July 22, 1928, allowed a motor omnibus of which he was in charge on a highway to carry a greater number of passengers than it was constructed to carry contrary to s. 13 of the Railway Passenger Duty Act, 1842. (1)

(1) By the Railway Passenger Duty Act, 1842, s. 13 : "And whereas the repealing of the duties in respect of the passengers to be conveyed by stage carriages in Great Britain, and granting a uniform rate of duty on stage carriages in lieu thereof, will render certain regulations necessary for preventing the overloading of such carriages, and the dangers and inconveniences consequent thereon ; be it therefore enacted, that no stage carriage shall be allowed to carry at one time a greater number of passengers . . . . than the same is constructed to carry according to the regulations of this Act ; and that no such carriage shall be deemed to be constructed to carry a greater number of passengers than the same will contain at one time, upon fit and proper seats provided therein or thereupon for that purpose, allowing for every passenger, on an average, upon each and every separate seat, a space convenient for sitting thereon of sixteen inches . . . ."

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At the hearing of the information the following facts were proved :—

The omnibus, of which the appellant was the conductor, had on it the words "licensed to carry 26 passengers." At the time of the commission of the alleged offence thirty-nine adults and ten children were on the omnibus, which was so obviously overcrowded that the justices thought it unnecessary to adjourn the case to have it produced or measured. The respondent had no order from the Commissioners of Inland Revenue to commence the proceedings against the appellant, but he was a duly authorized officer of the West Riding County Council under s. 1, sub-s. 2, of the Roads Act, 1920.

The justices found the offence proved, but they dismissed the information under the Probation of Offenders Act, 1907.

The conductor appealed.

Montgomery K.C. and *Sandlands* for the appellant. The proceedings taken against the appellant were "for the recovery of a fine . . . . under an Act relating to inland revenue" within the meaning of s. 21, sub-s. 1, of the Inland Revenue Regulation Act, 1890. As the order of the Commissioners of Inland Revenue for the commencement of the proceedings had not been obtained by the respondent the proceedings were not competent. The Railway Passenger Duty Act, 1842, is an "Act relating to inland revenue" within s. 21, sub-s. 1, of the Act of 1890. By its

Sect. 19: "In any prosecution for the recovery of any penalty relating to the carrying of passengers by any stage carriage . . . . if proof be made of the due admeasurement of . . . . any of the seats in or upon any such carriage . . . . the same shall be deemed and received as evidence thereof without the production of such carriage."

By the Inland Revenue Regulation Act, 1890, s. 21, sub-s. 1: "It shall not be lawful to commence proceedings against any person for the recovery of any fine, penalty, or forfeiture under any Act relating to inland revenue . . . . except by order of the Commissioners [of Inland Revenue] and in the name of an officer, or in England in the name of the Attorney-General for England . . . ."

Sub-s. 2: "Provided that nothing in this section shall extend to . . . . any proceeding on information or complaint of an officer of the peace for recovery of a fine or penalty imposed in relation to an offence against any law of excise in any case in which such a proceeding is authorised."

preamble it was declared to be "An Act to repeal the Duties payable on Stage Carriages and on Passengers conveyed upon Railways, and certain other Stamp Duties in Great Britain, and to grant other Duties in lieu thereof; and also to amend the Laws relating to the Stamp Duties" and "inland revenue" in the Act of 1890 is defined in s. 39 of that Act as "the revenue of the United Kingdom collected or imposed as stamp duties . . . ." Therefore, the proceedings could not lawfully be commenced without the order of the Commissioners: *Cameron* v. *Sweeney*. (1) Moreover there was no evidence on which the justices could properly determine how many passengers the omnibus was constructed to carry and, therefore, no proof of the offence alleged.

Singleton K.C. and *Paley Scott* for the respondent. The Railway Passenger Duty Act, 1842, cannot be regarded as an "Act relating to inland revenue" within s. 21, sub-s. 1, of the Act of 1890. By the Railway Passenger Duty Act, 1847, the collection and management of duties in respect of stage and hackney carriages was transferred from the Commissioners of Stamps and Taxes to the Commissioners of Excise, and in subsequent legislation, e.g., the Revenue Act, 1869, ss. 17, 18, those duties are referred to as "duties of excise." Therefore, s. 21, sub-s. 1, of the Act of 1890 does not apply, but the case falls within s. 21, sub-s. 2, of that Act, which excepts from the operation of sub-s. 1 proceedings "in relation to an offence against any law of excise." Alternatively, the Act of 1842 was divisible into two parts, one dealing with stamp duties and the other dealing with the totally different subject of the prevention of overcrowding in stage carriages, the sections under which the present proceedings were taken being in the latter part of the Act: see the recital at the beginning of s. 13. *Cameron* v. *Sweeney* (1) is distinguishable on the ground that it depended on the interpretation of s. 454 of the Burgh Police (Scotland) Act, 1892. In any case, it is irreconcilable with *Horn* v. *Duckett* (2), while in *Dennis* v. *Miles* (3) proceedings under the Act of 1842 were

(1) 1928 S. C. (J.) 34. (2) [1929] S. N. 25.
(3) [1924] 2 K. B. 399.

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apparently taken by an inspector of police without any order of the Commissioners. *Orr* v. *Strathern* (1) was also referred to. *Sandlands* replied.

LORD HEWART C.J. The case put forward by the appellant depended on two propositions. The first was that there was no evidence on which the justices were entitled to determine how many passengers the omnibus was constructed to carry, and the second was that the penalties imposed by the Railway Passenger Duty Act, 1842, were penalties under an "Act relating to inland revenue" within s. 21, sub-s. 1, of the Inland Revenue Regulation Act, 1890, and that the respondent had no order of the Commissioners of Inland Revenue to commence the proceedings.

With regard to the first point, undoubtedly the strict way of proving the number of persons whom the vehicle is constructed to carry is that expressly laid down by the statute itself. If the appellant had insisted on strict proof the case would have been adjourned by the justices that strict proof might be given. But the facts were so overwhelming that both the justices and the appellant felt that it would be mere waste of time to have an adjournment for that purpose. There is really nothing in the point. The vehicle was manifestly overcrowded.

The second point is of substance. Doubtless for some time after its passing, the Railway Passenger Duty Act, 1842, considered as a whole, might properly have been described as an "Act relating to inland revenue." Its preamble is: "An Act to repeal the Duties payable on Stage Carriages and on Passengers conveyed upon Railways, and certain other Stamp Duties in Great Britain, and to grant other Duties in lieu thereof; and also to amend the Laws relating to the Stamp Duties." But in later years what was left unrepealed of the Act came to be regarded as having quite a different complexion. In its original entirety the Act was of a twofold character. Partly it was an Act relating to inland revenue; partly it was a code relating to the prevention of over-loading

(1) 1929 Sc. L. T. 32.

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of a particular kind. What is left after the surgical operation of repeal which the Act has suffered is a limb concerned with the overloading of stage carriages which does not constitute an enactment "relating to inland revenue." It has been suggested that that conclusion is rendered improbable or undesirable by the decision in *Cameron* v. *Sweeney*. (1) Any judgment of the Court of Justiciary will always be treated with respect in this Court, but it is not binding on this Court and it is difficult to reconcile *Cameron* v. *Sweeney* (1) with the judgment of the Inner House in *Horn* v. *Duckett*. (2) One decision appears to lean in one direction, and the other in the other direction. Regarding the matter as free from authority, I do not think that when this prosecution was launched the surviving fragment of the Act of 1842 was an enactment "relating to inland revenue." That being so, there was no need for the respondent to bring himself within s. 21, sub-s. 1, of the Act of 1890.

Even, however, if the remaining part of the Act of 1842 did relate to inland revenue, I should be of opinion that the contention of the appellant was wrong on the ground that the present prosecution came within the exception specified in s. 21, sub-s. 2, of the Act of 1890 as being a "proceeding . . . . of an officer of the peace for recovery of a fine or penalty imposed in relation to an offence against any law of excise." No doubt, when the Act of 1842 was passed, the duties for which it provided were stamp duties, but in subsequent legislation—e.g., ss. 17 and 18 of the Revenue Act, 1869—duties on stage carriages were described as excise duties. This appeal, therefore, I think, fails.

AVORY J. I am of the same opinion. On the first point there is nothing in the Act of 1842 which makes it a condition precedent to any prosecution for the offence created by s. 13 that the carriage should be measured. The provision of s. 19 that, if evidence be given of the measurement of the seats, it shall be received without the production of the carriage, does not preclude other evidence being adduced to show that the carriage was overcrowded.

(1) 1928 S. C. (J.) 34. (2) [1929] S. N. 29.

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I rest my judgment on the main point on the fact that s. 18 of the Act of 1842 provides that "nothing in this Act contained shall in any way alter or affect any of the regulations or provisions" contained in the Stage Carriages Act, 1832 (2 & 3 Will. 4, c. 120). Sect. 103 of that Act provides the mode of proceeding before justices for the recovery of penalties for offences against the Act. There is nothing in that statute nor in the Act of 1842 which limits the right to prosecute to an officer of the inland revenue. On the contrary, s. 18 of the Act of 1842 provides that "it shall be lawful for any person to inform and prosecute for any penalty incurred" for the offence of carrying a greater number of passengers than the stage carriage is constructed to carry. Unless there is an obvious implied repeal of those provisions by s. 21 of the Act of 1890 it remains the law and, in my opinion, there is no such implied repeal.

I agree that the offence in this case is not an offence against an "Act relating to inland revenue" within s. 21 of the Act of 1890. For that reason it is unnecessary to consider whether sub-s. 2 of s. 21 would, in any case, afford an answer to the contention of the appellant. The appeal should be dismissed.

SWIFT J. I agree.

Appeal dismissed.

Solicitors for appellant: *Joynson-Hicks & Co., for R. A. C. Symes, Scunthorpe.*

Solicitors for respondent: *Warwick Williams & Marchant, for J. C. McGrath, Wakefield.*

G. F. L. B.

SWAITS *v.* ENTWISTLE.

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May 6.

Motor Car—Illumination of Identification Plate—Order made by Minister of Transport—Whether ultra vires—Termination of Powers of "local or other authority" to make Orders with respect to the carrying of Lights by Vehicles—Roads Act, 1920 (10 & 11 *Geo.* 5, *c.* 72), *s.* 12, *sub-s.* 1 (*c*)—*Road Transport Lighting Act*, 1927 (17 & 18 *Geo.* 5, *c.* 37), *s.* 11, *sub-s.* 2—*Road Vehicles (Registration and Licensing) Regulations*, 1924 (*St. R. & O.*, 1924, *No.* 1,462), *Reg.* 26—*Road Vehicles (Registration and Licensing) Amendment Regulations*, 1928, *dated June* 12, 1928, *Reg.* 2.

By s. 11, sub-s. 2, of the Road Transport Lighting Act, 1927, "the powers of any local or other authority under any Act to make orders, bye-laws or regulations with respect to the carrying of lights by vehicles on roads . . . . shall cease and determine."

The Minister of Transport on June 12, 1928, purporting to act, under the powers conferred upon him by s. 12, sub-s. 1, of the Roads Act, 1920, made a regulation to the effect that "whenever during the hours of darkness . . . . a vehicle is upon a public road, a lamp shall be kept burning on the vehicle, so contrived as to illuminate by means of reflection, transparency, or otherwise, and render easily distinguishable every letter and figure of the identification mark exhibited on the back of the vehicle":—

Held, that the words "or other authority" in s. 11, sub-s. 2, of the Road Transport Lighting Act, 1927, did not include the Minister of Transport, and that his power to make regulations under the powers conferred upon him by s. 12, sub-s. 1, of the Roads Act, 1920, had not been revoked by s. 11, sub-s. 2, of the Road Transport Lighting Act, 1927, and that therefore the regulation which the Minister of Transport made on June 12, 1928, requiring a lamp to be carried on vehicles on the road at night for the illumination of the identification plate, was not ultra vires.

CASE stated by justices for the borough of Darwen.

An information was preferred under para. 2 of the Road Vehicle (Registration and Licensing) Amendment Regulations, 1928 (1), duly made by the Minister of Transport in pursuance of powers conferred upon him under and by virtue of the

(1) Road Vehicles (Registration and Licensing) Amendment Regulations, 1928, dated June 12, 1928:—

Reg. 2: "The Principal Regulations [Road Vehicles (Registration and Licensing) Regulations, 1924] shall have effect as though Reg. 26 thereof were omitted and the following regulation were inserted in substitution therefor, that is to say: '26 (1.) Whenever during the hours of darkness as defined by sub-s. 4 of s. 1 of the Road Transport Lighting Act, 1927, a vehicle is upon a public road, a lamp shall be kept burning on the vehicle, so contrived as to illuminate by means of reflection, transparency, or otherwise, and render easily distinguishable every letter and figure of the identification mark exhibited on the back of the vehicle. . . . .'"

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Roads Act, 1920, by the appellant, E. J. Swaits, superintendent of the Lancashire Constabulary, against the respondent, N. M. Entwistle, alleging that he on January 31, 1929, then being the driver of a certain motor car on a public highway called Bull Hill, Darwen, in the county of Lancaster, during the hours of darkness, to wit, 8.45 P.M., unlawfully did not keep a lamp burning on the said motor car so contrived as to illuminate by means of reflection, transparency, or otherwise, and render easily distinguishable every letter and figure of the identification plate exhibited at the back of the said motor car, contrary to the form of the statute in such case made and provided.

Upon the hearing of the information on March 14, 1929, the following facts were proved:—

(1.) On January 31, 1929, at Darwen, in the county of Lancaster, the respondent, then being the driver of a certain motor car on a public highway called Bull Hill during the hours of darkness, to wit, 8.45 o'clock at night, did not keep a lamp burning on the said motor car so contrived as to illuminate by means of reflection, transparency, or otherwise, and render easily distinguishable every letter and figure of the identification mark exhibited at the back of the motor car.

(2.) A rear lamp was alight on the motor car and showed a red light clearly visible to the rear. A white light showing from the side of the rear lamp did not illuminate or render distinguishable any letter or figure of the identification mark exhibited on the back of the motor car.

On the part of the appellant it was contended: (*a*) That there was a breach of the regulation above mentioned; (*b*) that such regulation was valid, being duly made under the powers conferred upon the Minister of Transport by s. 12, sub-s. 1, of the Roads Act, 1920. (1) It was admitted that

(1) The Roads Act, 1920, s. 12, sub-s. 1: "The Minister may make regulations generally for the purpose of carrying this Act into effect, and in particular, without prejudice to the generality of the foregoing provision, may make regulations . . . . (*c*) prescribing the size, shape and character of the identification marks or the signs to be fixed on any vehicle and the manner in which those marks or signs are to be displayed and rendered easily distinguishable, whether by night or by day. . . . ."

apart from that statute no power was conferred upon the Minister to make any regulation requiring illumination of identification marks or signs; (*c*) that such powers were not expressly or impliedly revoked by s. 11, sub-s. 2, of the Road Transport Lighting Act, 1927 (1); (*d*) that such regulation was in full force and binding on all users of motor cars.

The respondent appeared and pleaded not guilty, but did not adduce any legal argument on his own behalf.

The attention of the justices was called to the Roads Act, 1920, and the Road Transport Lighting Act, 1927.

The justices were of opinion: (1.) that there had been in fact a breach by the respondent of the regulation, if such were valid and binding; (2.) that such regulation purporting to be made by the Minister of Transport under the powers contained in s. 12 of the Roads Act, 1920, was ultra vires, any powers thereby conferred upon him to make any such regulation having, in their opinion, been revoked by s. 11, sub-s. 2, of the Road Transport Lighting Act, 1927, they being of the opinion that the words "or other authority" in that section included the Minister of Transport. There being no other authority cited to the justices under which the Minister had power to make a regulation dealing with the illumination of the rear identification mark, they were of opinion that the respondent had in law committed no offence, and they accordingly refused to convict and dismissed the summons.

The question for the opinion of the Court was whether the justices upon the above statement of facts came to a correct determination and decision in point of law.

(1) Road Transport Lighting Act, 1927, s. 11, sub-s. 2: "The powers of any local or other authority under any Act to make orders, bye-laws, or regulations with respect to the carrying of lights by vehicles on roads (other than lights carried for the purposes of internal illumination or for illuminating taximeters) shall cease and determine, and any Act or order having the force of an Act, and any regulations made under such an Act or order, and any bye-law made under the powers conferred by any Act, so far as the same relates to the carrying of lights by vehicles on roads (other than as aforesaid), and any order made under ss. 3 or 4 of the Lights on Vehicles Act, 1907, shall cease to have effect. . . . ."

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R. H. Etherton for the appellant. The justices were wrong in holding that the regulation made by the Minister of Transport in 1928, requiring that a lamp should be kept burning on a vehicle upon a public road at night so as to illuminate the identification mark on the back of the vehicle, was ultra vires, upon the ground that any powers conferred upon him by s. 12 of the Roads Act, 1920, to make such regulation had been revoked by s. 11, sub-s. 2, of the Road Transport Lighting Act, 1927. The regulations requiring the illumination of the identification mark at the back of a motor car have always been kept separate and distinct from the regulations requiring lights to be carried by vehicles on the road at night in order to show the position of the vehicle and the direction in which it is travelling. The Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), by s. 2, required that a light locomotive on the road should at night carry a lamp attached thereto so as to exhibit a light. The Light Locomotives on Highways Order, 1896 (St. R. & O., 1896, No. 952), which was made under that Act, provided in art. 2 (9.), that the lamp to be carried attached to the light locomotive should be so constructed and placed as to exhibit a white light in the direction towards which the light locomotive was proceeding and to exhibit a red light in the reverse direction, and the lamp was to be placed on the extreme right or off side of the light locomotive. That regulation was repealed and re-enacted by art. 2 (7.), of the Motor Cars (Use and Construction) Order, 1904 (St. R. & O., 1904, No. 315). The Lights on Vehicles Act, 1907 (7 Edw. 7, c. 45), provided by s. 1 that similar provisions should apply to all vehicles on the road at night. The Locomotives on Highways Act, 1896, so far as that Act relates to lights on vehicles, and the Lights on Vehicles Act, 1907, were repealed by the Road Transport Lighting Act, 1927, which Act now by s. 1 requires that every vehicle on the road during the hours of darkness shall carry two lamps each showing to the front a white light, and one lamp showing to the rear a red light. So far as lights on vehicles are concerned that Act deals exclusively with those lights on

vehicles which show the position of vehicles on the road and the direction in which they are proceeding. There is no provision in that Act requiring the illumination of the identification mark exhibited on the back of a motor car. The first mention of identification marks on motor cars is contained in the Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 2 of which Act provided "that a mark, indicating the registered number of the car and the council with which the car is registered, shall be fixed on the car. . . . ." That Act does not anywhere deal with the necessity for the indication by lights of the position and direction of vehicles on the road. The Legislature dealt with the two matters quite separately. The Roads Act, 1920, repealed the Motor Car Act, 1903, in so far as that Act dealt with identification marks, and provided in s. 12, sub-s. 1, that the Minister of Transport might make regulations generally for the purpose of carrying the Act into effect, and (inter alia) might make regulations "prescribing the size, shape and character of the identification marks or the signs to be fixed on any vehicle and the manner in which those marks or signs are to be displayed and rendered easily distinguishable, whether by night or by day." That section is in full force to-day. The Minister of Transport, under the power conferred upon him by that Act, made the Road Vehicles (Registration and Licensing) Regulations, 1924, reg. 26 of which provides that "whenever during the period between half an hour after sunset and half an hour before sunrise a vehicle is upon a public road, a lamp shall be kept burning on the vehicle, so contrived as to illuminate by means of reflection, transparency, or otherwise, and render easily distinguishable every letter and figure of the identification mark exhibited on the back of the vehicle. . . . ." Another regulation was substituted for this regulation by the Road Vehicles (Registration and Licensing) Amendment Regulations, 1928, with a slight alteration of language necessitated by the introduction of summer time. Sect. 11, sub-s. 2, of the Road Transport Lighting Act, 1927, refers only to the making of regulations with respect to the carrying of lights by vehicles on roads for the purpose of showing the

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position of such vehicles and the direction in which they are proceeding. It does not refer to regulations requiring the illumination of a number plate, otherwise it would be contradicting the provisions of s. 2, sub-s. 2, which provides that "No vehicle shall show any light other than a red light to the rear, but this sub-section shall not apply to lamps carried by vehicles for the purposes . . . . of illuminating a number plate. . . . ." The provision in s. 11, sub-s. 2, that "the powers of any local or other authority under any Act to make orders, bye-laws or regulations with respect to the carrying of lights by vehicles on roads . . . . shall cease and determine," does not apply to the Minister of Transport, because ss. 3, 4 and 9 of the Act expressly refer to regulations made by the Minister of Transport. Further the words "other authority" in s. 11, sub-s. 2, must be read as ejusdem generis with "local authority," and therefore will not include the Minister of Transport. Hamilton J. in *Attorney-General* v. *Seccombe* (1) said that "the words 'by contract or otherwise' were merely intended to be an improvement in drafting upon the earlier and more diffuse expression. There is no reason why the rule of ejusdem generis construction should not apply to these words." It has always been held that general words following particular words will not include anything of a class superior to that to which the particular words belong: see Craies' Statute Law, 3rd ed., p. 165; Maxwell's Interpretation of Statutes, 6th ed., pp. 577, 584.

[He was stopped.]

A. A. Capewell for the respondent. The words "other authority" in s. 11, sub-s. 2, of the Road Transport Lighting Act, 1927, include the Minister of Transport, and therefore his power under the Roads Act, 1920, to make regulations for the illuminating of the number plate on a motor car has been revoked. The rule of ejusdem generis construction does not apply to the words, "any local or other authority" in that sub-section. That sub-section deals with the making of regulations with respect to the carrying of any lights by vehicles on roads with the exception of lights carried for the

(1) [1911] 2 K. B. 688, 703.

purposes of internal illumination or for illuminating taximeters. Sect. 2 of the Act of 1927 is merely permissive in character and is not inconsistent with the contention now put forward on behalf of the respondent. The section, after providing that no vehicle shall show any light other than a red light to the rear, makes an exception in favour of a lamp carried by a vehicle for the purpose of illuminating a number plate.

LORD HEWART C.J. This case turns upon the construction not only of an Act of Parliament but of regulations made under an Act of Parliament, and I have little doubt that the justices misdirected themselves in point of law. It is not necessary to repeat the facts of the case. The whole point is that in the view of the justices the regulation under which the prosecution was launched, purporting to be made by the Minister of Transport under the powers contained in s. 12 of the Roads Act, 1920, was ultra vires. They came to that conclusion because in their view the powers which were conferred upon the Minister of Transport by that section were revoked by s. 11, sub-s. 2, of the Road Transport Lighting Act, 1927. I pass over other reasons which seem to me to make it clear that the justices were wrong, and I deal with the point which they themselves mentioned. They expressed the view that the words "or other authority" in that sub-section include the Minister of Transport. The words of the section are: "The powers of any local or other authority under any Act to make orders, by-laws, or regulations with respect to the carrying of lights by vehicles on roads . . . . shall cease and determine . . . ." If one looks at various places in this Act it is quite obvious that the Minister of Transport is expressly empowered by the Act to make regulations. For example, by s. 3: "The Minister may by regulations prescribe the conditions subject to which lamps, showing a light to the front, may be used . . . ." Sect. 4: "Unless otherwise provided by the Minister by regulations, no light shown by a vehicle, other than a dipping head light, shall be moved by swivelling, deflecting or otherwise while the vehicle is in motion." It appears to me to be manifestly

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repugnant to the view that "local or other authority" in s. 11, sub-s. 2, includes the Minister of Transport, that throughout the Act we find provisions that the Minister of Transport may make regulations. If his powers have ceased and determined, how can he make regulations? And, indeed, with regard to the particular subject-matter of this prosecution, which was the necessity (if necessity there be) of keeping during the hours of darkness a lamp burning on a motor car so contrived as to illuminate by means of reflection, transparency, or otherwise, and render easily distinguishable every letter and figure of the identification mark exhibited on the back of the said car, s. 2 of this statute provides by sub-s. 2: "No vehicle shall show any light other than a red light to the rear, but this sub-section shall not apply to lamps carried by vehicles for the purposes of . . . . illuminating a number plate . . . ." Now it is common ground that when that Act was passed there was in force the regulation of 1924 upon that very matter, a regulation afterwards repeated with a slight amendment in 1928. Again it seems to me inconceivable that by s. 11, sub-s. 2, orders made should cease to have effect if they are orders of the Minister of Transport, when one of those orders admittedly is an order with regard to lights illuminating a number plate, and that matter is expressly reserved and saved by s. 2, sub-s. 2, of the same Act.

The question can be approached from other angles, and it seems to me that it is quite idle, except for controversial purposes, to suggest that this regulation was ultra vires. To say that it is unintelligible or difficult to understand is a totally different proposition, but when a man is upon his defence he cannot be heard to say that he does not know what the law is, nor that he does not understand what are the various regulations made under many statutes.

I think, therefore, that this appeal ought to succeed, and that the case ought to go back to the justices with a direction to convict.

AVORY J. I agree that the justices in this case appear to have been misled into thinking that reg. 26 of the regulations

made in 1924, as amended by the regulation made in 1928, was not still in force. I think it is impossible to reconcile the contention of the respondent here under s. 11, sub-s. 2, of the Road Transport Lighting Act, 1927—namely, that the words, "other authority," include the Minister of Transport, with other provisions in this statute, particularly the provisions of s. 2, sub-s. 2, and those in s. 3 to which my Lord has referred. It is suggested that there is no inconsistency in s. 2 with the contention of the respondent, because sub-s. 2 is only permissive, that is to say that, having provided that no vehicle shall show any light other than a red light to the rear, it makes an exception in favour of a lamp carried by a vehicle for the purpose of illuminating a number plate. But the only reason and purpose of making that exception is that persons may comply with the law which was recognized to be then existing—namely, that they are, by regulations made under s. 12 of the Roads Act, 1920, to have an identification plate on the vehicle which is to be displayed and rendered easily distinguishable, whether by night or by day, and so that exception was introduced into sub-s. 2, as I have said, in order to enable persons to comply with the law which was recognized by this Act of 1927 to be then in existence.

For these reasons I agree that the justices ought to have convicted.

SWIFT J. I agree.

Appeal allowed.

Case remitted.

Solicitors for appellant: *Greenwell & Co., for Sir George Etherton, Preston.*

Solicitors for respondent: *Amery Parkes & Co.*

R. F. S.

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May 14.

SHEFFIELD CORPORATION *v.* LUXFORD.

SHEFFIELD CORPORATION *v.* MORRELL.

Landlord and Tenant—Notice to quit—Order for Possession—Discretion—"May order"—Postponement of Operation of Order—Discretion—County Courts Act, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 138.

The words "may order" in s. 138 of the County Courts Act, 1888, are enabling words only, but where the legal right of a landlord to the possession of premises has been established it is the duty of the judge, notwithstanding the permissive form of the section, to make an order for possession.

In exercising the discretion given him as to the period for the coming into operation of the order, the judge must fix a period reasonably adjusted to the circumstances of the case, including the nature and term of the tenancy. The county court judge in two cases of weekly tenants whose tenancies had been validly terminated by notice to quit, refused to make any order in one case, and in the other, while making an order, postponed its operation for twelve months:—

Held, that this was not a judicial exercise of his discretion in either case.

APPEALS from Sheffield County Court.

The defendant Luxford was the weekly tenant of the plaintiffs, the Sheffield Corporation, of a dwelling-house on a large housing estate, which, having been erected since 1919, was not within the provisions of the Rent Restrictions Acts. Due notice to quit was given by the plaintiffs to the defendant, but he refused to give up possession. In proceedings to recover possession under s. 138 of the County Courts Act, 1888 (1), the county court judge, in the purported exercise of his discretion under the Act (1), in the circumstances set out in the judgment, made an order for possession, but postponed its operation for twelve months.

(1) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 138: "When the term . . . . of the tenant of any corporeal hereditament [where the rent does not exceed 50*l.* a year] . . . . shall have been determined . . . . by notice to quit, and such tenant . . . . shall neglect . . . . to deliver up possession . . . . the landlord may enter a plaint . . . . against such tenant . . . . for the recovery of the [premises] . . . . and if the defendant shall not . . . . show good cause to the contrary, then . . . . the judge may order that possession of the premises . . . . be given by the defendant to the plaintiff, either forthwith or on or before such day as the judge shall think fit to name. . . . ."

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In the case of Morrell the facts were similar, but the county court judge refused to make any order at all. In both cases he acted on the view that s. 138 of the Act of 1888 (1) gave him an absolute discretion.

The plaintiffs appealed in both cases.

W. A. Macfarlane for the plaintiffs. The county court judge had no power in the case of Morrell to refuse to make an order for possession once it was established, as it admittedly was in this case, that the plaintiffs had a legal right to the possession of the premises. The only reason the plaintiffs resort to a court of law at all is, not to establish their legal right, but in order that it may give them what they cannot take themselves—namely, possession by force. It is true that s. 138 says that the judge "may" make the order, but this is one of the cases where that word, though permissive in form, means "must." At least, whatever its meaning in other circumstances, in the present circumstances, where a legal right in the plaintiffs has been established, "may" is an enabling word, and it was the duty of the judge to exercise the power entrusted to him by making an order for possession. In *Julius* v. *Bishop of Oxford* Lord Blackburn said (2): "Enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right." Therefore the judge ought to have made an order for possession, postponing its operation, if, in the exercise of the discretion given to him in this respect, he thought fit to do so, for some reasonable period.

In Luxford's case the judge postponed the operation of the order for twelve months, imposing as conditions that rent should be paid and that the premises should not be used as a shop. It is true that s. 138 of the Act of 1888 does say that the judge may order possession to be given forthwith or on or before such day as the judge shall think fit to name. But that discretion must be exercised judicially, and to postpone the operation of the order for twelve months is not to exercise discretion judicially, for in effect the order turns a

(1) See note (1), ante, p. 180. (2) (1880) 5 App. Cas. 214, 244.

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weekly tenancy into a tenancy for twelve months certain. As was said by the Court in *Kelly* v. *White* (1) the judge has created a new tenancy.

[*Reg.* v. *Hopkins* (2); *Rex* v. *Metropolitan Police Commissioner. Ex parte Holloway* (3); and *Rex* v. *Mitchell* (4) were also referred to.]

The judge had no discretion to impose conditions, because if broken the plaintiffs would be under an obligation to make a further application to him to vary his order.

[He was stopped.]

The defendants were not represented.

TALBOT J. These are two cases in which the plaintiffs, the Lord Mayor and Corporation of the City of Sheffield, proceeded under s. 138 of the County Courts Act, 1888, against two tenants, the defendants, who held houses of theirs on a large housing estate. It was established that notices to quit had been served on these tenants, both of them being weekly tenants, and that those notices had expired. No question arises under the Rent Restrictions Acts, because these houses were built and let after April 2, 1919: see the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 9. The learned county court judge has taken a different line in the two cases, I do not know that it very clearly appears why, nor is it necessary to inquire. It is unfortunate that we have not had the advantage of any argument for the respondent in either case; but Mr. Macfarlane has laid all the facts before us and, I think, has put us in a position to come to a decision. In the absence of any such argument and having regard to the way in which this Act is worded, it is important that we should not go beyond what is absolutely necessary to be decided.

The language of s. 138 of the County Courts Act, 1888, is that on complying with the conditions of the Act (as to which there is no dispute here), "the judge may order that possession of the premises mentioned in the plaint be given

(1) [1920] W. N. 220, 221.
(2) (1900) 64 J. P. 454.
(3) [1911] 2 K. B. 1131.
(4) [1913] 1 K. B. 561.

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by the defendant to the plaintiff, either forthwith or on or before such day as the judge shall think fit to name." Now, in the case of Morrell, the learned judge has refused the order altogether. In his view he has, both as to giving possession and as to the date at which possession is to be given, a discretion: and I think by that he means a complete discretion, to be exercised, of course, in a judicial manner. In his opinion, Morrell showed reasonable cause why possession should not be given. He took from the statement made before him by the representative of the plaintiffs the fact that the motive, which operated or, at any rate, principally operated to induce them to take legal proceedings was the fact that Morrell was using his house as a shop which, by the terms of his tenancy, was not allowed, as I understand, because the plaintiffs were themselves under covenant not to allow it to be used except as a dwelling-house. Having that in view, the learned county court judge said that no condition that he was not to use the house as a shop was made or brought to his attention until after he had accepted tenancy; that in fact he had undertaken not to continue to use the house as a shop; and that the landlords had refused eight weeks' rent offered by Morrell, and that there would be a difficulty in his way, while his rent book showed arrears, in getting other premises. The learned judge appears to have offered the solicitor who was representing the plaintiffs to defer the operation of the order for possession for six months and, on that being refused, he gave judgment for the defendant with costs.

Now, it is quite true that the language of the Act is permissive and not compulsory. It has often been said, and it is possibly a convenient abbreviation, but like all inaccurate expressions it often leads to misunderstanding, that in many statutes the word "may" means "must." I think it has been pointed out once for all in *Julius* v. *Bishop of Oxford* (1) that that is an inaccurate expression. "May" always means may. "May" is a permissive or enabling expression; but there are cases in which, for various reasons,

(1) 5 App. Cas. 214, 222, 229, 235, 241.

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as soon as the person who is within the statute is entrusted with the power it becomes his duty to exercise it. One of those cases is where he is applied to to use the power which the Act gives him in order to enforce the legal right of the applicant. I think this is such a case.

On the information before us, the legal right of the plaintiffs, the landlords, was complete as soon as the notice to quit had expired, and the tenant's right to remain in occupation of this house had absolutely ceased. I think it is true to say, as was said by the learned counsel for the appellants, that all that induces the landlord to resort to the county court is by the ministry of the court to give effect to his right to possession by force and also to save himself from taking measures for resuming possession; but before that his legal right is complete. That being so, I think that, as soon as the application is made to the judge for an order for possession, the latter being clothed by the Act of Parliament with the power to make such an order, it becomes his duty to make it. And if the Act contained no more than that, it would be his duty to make the order then and there without any qualification. But the Act does undoubtedly give him, in terms, a certain discretion, because after the words "the judge may order that possession . . . . be given," the section continues: "either forthwith or on or before such day as the judge shall think fit to name."

That becomes directly material when we are considering the second case, the case of Luxford. The facts are very similar in the two cases, but the learned judge made quite a different order. His judgment was: Possession in twelve months; rent to be paid; not to be used as a shop. Mr. Luxford was, as I have said, a weekly tenant, and the effect of this judgment really is to turn him from a weekly tenant into a tenant for a year certain and to order that for that year certain a payment, which the learned judge describes as rent, is to be made. He does not say how much it is to be; but I suppose we may infer that he means the same rent as had already been paid on the weekly tenancy. Also the learned judge imposed a further condition

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—namely, that the place was not to be used as a shop. The learned counsel has called our attention to several difficulties which appear the moment one considers how to give effect to those conditions. And, quite apart from that, it appears, following the language of this Court in a case having some similarity to this, that this order creates or purports to create a new tenancy in lieu of that which the tenant had got (1): a tenancy against the will of the landlords, who have at the present moment the actual vested right, subject to the discretion of the court so far as it can be exercised, to the possession of the premises. I think that a postponement of the operation of the order for twelve months is not, at any rate unless there are some circumstances quite other than those that appear in this case, permissible in exercising discretion under this Act.

I recognize that this is a somewhat difficult question, because undoubtedly the Act by its terms contemplates a postponement of the day on which possession is to be given and it indicates no limit to the period for which it may be postponed. I do not think it would be fair to the learned judge to regard this as a colourable exercise of his discretion; that is to say, in effect a denial to the landlord of the justice which he is seeking. It would not be fair to the learned judge to compare his judgment to one such as one has heard of for a debt of say 20*l.* to be paid in instalments of a penny a month. But I think that to postpone possession for a period of twelve months, even apart from the other conditions, is not such an exercise of discretion as the Act of Parliament, in spite of its unlimited terms, contemplates or permits. It is, of course, to some extent a question of degree, but I think the period must not be more than is reasonably adjusted to the circumstances of the case, including the nature of the tenancy, the term (in this case a weekly term) and the object which I think the Legislature must be taken to have had in this enactment, that is to say, to relieve the judge of the necessity of making an order for possession to be given then and there without further warning to the tenant. I rather

(1) *Kelly* v. *White* [1920] W. N. 220, 221.

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hesitate to name any time for giving possession, and we do not give judgment fixing any definite time; but I think that some such period as four or five weeks, in the absence of any altogether exceptional circumstances quite different from the facts here, would represent the outside limit of the postponement which under this power a judge would be justified in granting.

I think, therefore, that in both these cases the proper order will be to allow the appeal and to remit the cases to the learned judge to make an order for possession, postponing the operation of it, if he thinks fit to exercise his discretion, for such period as he thinks right, having in view what I have endeavoured to express. The plaintiffs will be entitled to the costs of these appeals. I ought to add one thing. I think the learned judge ought to consider, when he has the case again before him, the postponement that has already taken place since the right of the landlord was established.

WRIGHT J. I agree. I do not desire to add anything to what has fallen from my Lord.

Appeals allowed.

Solicitors for plaintiffs: *Rollit, Sons & Haydon, for Sir W. E. Hart, town clerk, Sheffield.*

W. L. L. B.

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April 29, 30;
May 1.

BIRMINGHAM CORPORATION *v.* INLAND REVENUE COMMISSIONERS.

Revenue—Income Tax—Corporation—Assisted Housing Scheme—Issue of Local Bonds—Interest—Income Tax deducted—Claim by Corporation to Retain—Exchequer Subsidy—Earmarked to meet Loss on Scheme—Borough Fund—Interest on Loans not effectively charged on—Housing, Town Planning, &c., Act, 1919 (9 & 10 *Geo.* 5, *c.* 35)—*Regulations made thereunder* (*St. R. & O.* 1919, *No.* 2047)—*Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *All Schedules Rules, rr.* 19, 21.

In 1920 a Corporation undertook an assisted housing scheme under the Housing, Town Planning, &c., Act, 1919, and for the purpose of the scheme borrowed money on local bonds secured on their rates, revenue and property. In each of the years ending April 5, 1922, 1923 and 1924, the separate account kept in respect of the scheme, as required by regulations under the Act of 1919, showed a loss due entirely to the need to pay interest on the local bonds. This loss was largely made good by an Exchequer subsidy, as provided by these regulations. The Corporation had one fund only, the borough fund, any deficiency on which was met by raising a borough rate. Into this fund the balance of profits of the Corporation's commercial activities was paid. In paying the interest on the local bonds the Corporation deducted income tax. The question arose whether any part of the interest had been paid out of profits or gains not brought into charge to income tax so that the Corporation were liable to account for them under r. 21 of the All Schedules Rules of the Income Tax Act, 1918. The Crown contended that the Exchequer subsidy must be regarded as having been applied for the purpose so that to that extent the interest was paid out of money not already brought into charge, but the Corporation contended that the interest must be treated as paid out of profits and gains forming part of the borough fund which had already been brought into charge and that the Exchequer subsidy only went to recoup the borough fund:—

Held (affirming the decision of Rowlatt J.), that the Exchequer subsidy was paid solely to meet the loss on the housing scheme and for the express purpose of preventing that loss falling on the general revenue of the Corporation, and that the interest on the housing loan was not operatively or effectively charged upon the borough fund generally, but upon the profits and gains of the housing scheme, and the Exchequer subsidy.

Sugden v. *Leeds Corporation* [1914] A. C. 483, 497 applied.

Dickson v. *Hampstead Borough Council* (1927) 11 Tax Cas. 691 approved.

APPEAL from a decision of Rowlatt J. on a case stated under the Finance Act, 1927, s. 26, and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on July 11, 1928,

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the Corporation of Birmingham (hereinafter called "the Corporation") appealed against assessments to income tax made upon them in sums of 83,433*l.*, 125,731*l.* and 110,434*l.* for the years ended April 5, 1922, April 5, 1923, and April 5, 1924, respectively. These assessments were made under the provisions of r. 21 of the General Rules applicable to Schedules A, B, C, D and E of the Income Tax Act, 1918, as amended by s. 26 of the Finance Act, 1927, in respect of certain sums of interest paid on money borrowed by the Corporation for the purpose of its assisted housing scheme undertaken in pursuance of the provisions contained in the Housing, Town Planning, &c., Act, 1919.

On making payments of such interest the Corporation had deducted tax, and the question for the opinion of the Court was whether, upon the facts of the case (as hereinafter set out) and the law applicable thereto, the Corporation was liable to account to the Commissioners of Inland Revenue for the tax so deducted. No dispute as to figures arose in this case, and it was agreed that if the Corporation was so liable to account the assessments would stand, and if the Corporation was not so liable, that the assessments would require to be discharged.

2. A charter of incorporation was granted to Birmingham in the year 1838. Since that date the funds and rating powers of the Corporation had been regulated by a series of public and local Acts. Since the passing of the Local Government Act, 1913, the Corporation had had one fund only, the borough fund, and any deficiency in that fund was met by raising a borough rate. The general expenses of its execution of the Public Health Acts were paid from that fund.

The balance of profits of the Corporation's markets, gas, water, electric supply and tramway undertakings were under the provisions of the relevant Acts paid into the borough fund.

3. In the year ending April 5, 1920, the Corporation prepared and undertook a housing scheme under the provisions of the Housing, Town Planning, &c., Act, 1919.

The relevant sections of that Act were as follows :—

Sect. 1, sub-s. 1 : "It shall be the duty of every local authority within the meaning of Part III. of the Housing of the Working Classes Act, 1890 (hereinafter referred to as the principal Act), to consider the needs of their area with respect to the provision of houses for the working classes, and within three months after the passing of this Act, and thereafter as often as occasion arises, or within three months after notice has been given to them by the Local Government Board, to prepare and submit to the Local Government Board a scheme for the exercise of their powers under the said Part III."

Sect. 7, sub-s. 1 : "If it appears to the Local Government Board that the carrying out by a local authority, or by a county council to whom the powers of a local authority have been transferred under this Act, of any scheme approved under section one of this Act, or the carrying out of a re-housing scheme in connection with a scheme made under Part I. or Part II. of the principal Act, including the acquisition, clearance, and development of land included in the last-mentioned scheme, and whether the re-housing will be effected on the area included in that scheme or elsewhere, or the carrying out of any scheme approved by the Board for the provision of houses for persons in the employment of or paid by a county council or a statutory committee thereof, has resulted or is likely to result in a loss, the Board shall, if the scheme is carried out within such period after the passing of this Act as may be specified by the Board with the consent of the Treasury, pay or undertake to pay to the local authority or county council out of moneys provided by Parliament such part of the loss as may be determined to be so payable under regulations made by the Board with the approval of the Treasury, subject to such conditions as may be prescribed by those regulations."

Sub-s. 2 : "Such regulations shall provide that the amount of any annual payment to be made under this section shall—

"(*a*) in the case of a scheme carried out by a local authority, be determined on the basis of the estimated annual loss

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resulting from the carrying out of any scheme or schemes to which this section applies, subject to the deduction there, from of a sum not exceeding the estimated annual produce of a rate of one penny in the pound levied in the area chargeable with the expenses of such scheme or schemes; and

"(*b*) in the case of a scheme for the provision of houses for persons in the employment of or paid by a county council, or a statutory committee thereof, be an amount equivalent to thirty per centum of the annual loan charges as calculated in accordance with the regulations on the total capital expenditure incurred by the county council for the purpose of the scheme:

"Provided that the regulations shall include provisions—

"(i) for the reduction of the amount of the annual payment in the event of a failure on the part of the local authority to secure due economy in the carrying out and administration of a scheme to charge sufficient rents or otherwise to comply with the conditions prescribed by the regulations;

"(ii) for the determination of the manner in which the produce of a rate of one penny in the pound shall be estimated; and

"(iii) for any adjustment which may be necessary in consequence of any difference between the estimated annual produce and the actual produce of the said rate of one penny in the pound."

Sect. 40: "This Part of this Act shall be construed as one with the principal Act [i.e. the Housing of the Working Classes Act, 1890], and any provisions of this Part of this Act which supersede or amend any provisions of the principal Act shall be deemed to be part of that Part of the principal Act in which the provisions superseded or amended are contained, and references to this Part of this Act to the principal Act or to any provisions of the principal Act shall be construed as references to that Act or provision as amended by any subsequent enactment, including this Part of this Act. . . . ."

The relevant provisions of the Housing of the Working Classes Act, 1890, as to the defraying of expenses and the

powers of borrowing in connection with schemes for the housing of the working classes were as follows :—

Sect. 65 : " All expenses incurred by a local authority in the execution of this part of this Act shall be defrayed—

" (i) in the case of an authority in the administrative county of London, out of the Dwelling House Improvement Fund under Part I. of this Act ;

" (ii) in the case of an urban sanitary authority, as part of the general expenses of their execution of the Public Health Acts. . . . ."

Sect. 66 : " The London County Council and the Commissioners of Sewers may borrow for the purpose of the execution of this part of this Act, in like manner and subject to the like conditions as they may borrow for the purposes of Part I. of this Act, and a sanitary authority may borrow for the purpose of the execution of this part of this Act in like manner and subject to the like conditions as for the purpose of defraying the above-mentioned general or special expenses."

The Corporation was an urban sanitary authority, and accordingly the following provisions of the Public Health Act, 1875, relating to expenses and borrowing powers were material :—

Sect. 207 : " All expenses incurred or payable by an urban authority in the execution of this Act, and not otherwise provided for, shall be charged on and defrayed out of the district fund and general district rate leviable by them under this Act, subject to the following exceptions, (namely)

. . . . . .

" That where at the time of the passing of this Act the expenses incurred by an urban authority in the execution of certain purposes of the Sanitary Acts were payable out of the borough fund and borough rate, and the expenses incurred by such authority in the execution of the other purposes of the said Acts were payable out of a rate or rates leviable by that authority throughout the whole of their district for paving sewering or other sanitary purposes, then the expenses incurred by that authority in the execution of the same or similar purposes respectively under this Act shall respectively

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be charged on and defrayed out of the borough fund and borough rate, and out of the rate or rates leviable as aforesaid."

Sect. 233: "Any local authority may, with the sanction of the Local Government Board, for the purpose of defraying any costs charges and expenses incurred or to be incurred by them in the execution of the Sanitary Acts or of this Act, or for the purpose of discharging any loans contracted under the Sanitary Acts or this Act, borrow or re-borrow, and take up at interest, any sums of money necessary for defraying any such costs charges and expenses, or for discharging any such loans as aforesaid.

"An urban authority may borrow or re-borrow any such sums on the credit of any fund or all or any rates or rate out of which they are authorised to defray expenses incurred by them in the execution of this Act, and for the purpose of securing the repayment of any sums so borrowed, with interest thereon, they may mortgage to the persons by or on behalf of whom such sums are advanced any such fund or rates or rate.

"A rural authority may borrow or re-borrow any such sums, if applied or intended to be applied to general expenses of such authority, on the credit of the common fund out of which such expenses are payable, and if applied or intended to be applied to special expenses of such authority, on the credit of any rate or rates out of which such expenses are payable, and for the purpose of securing the repayment of any sums so borrowed, with interest thereon, they may mortgage to the persons by or on behalf of whom such sums are advanced any such fund rate or rates."

4. In order to raise money for the purpose of their housing scheme the Corporation issued stock and local bonds and also borrowed on mortgage. In each case the loan was secured on all the rates, revenues and property of the Corporation and in the case of the local bonds, the rates, revenues and property of the Corporation were expressed to include "the grant to be paid by the Government in aid of the housing scheme."

The houses built by the Corporation under its assisted housing scheme were completed by the year 1924.

5. In accordance with the powers contained in s. 7 of the Housing, Town Planning, &c., Act, 1919, regulations were made by the Minister of Health and became Statutory Rules and Orders, 1919, No. 2047. In 1925 certain further regulations amending (in certain respects) those above referred to were made by the Minister of Health and became Statutory Rules and Orders, 1925, No. 778.

The following are among the material regulations :—

Statutory Rules and Orders, 1919, No. 2047.

Art. IV.—(1.) The local authority shall for the purposes of an assisted scheme, or a scheme which, in the opinion of the Minister, is likely to become an assisted scheme, keep separate accounts, to be called "The Housing (Assisted Scheme) Accounts," including a separate revenue account, to be called "The Housing (Assisted Scheme) Revenue Account."

(2.) They shall cause to be credited to the Housing (Assisted Scheme) Revenue Account in each financial year :—

(*a*) the produce of a rate of one penny in the pound levied in the area chargeable with the expenses of the assisted scheme, or such less amount as may be necessary to meet the deficit for the financial year ;

(*b*) the rents (inclusive of rates where rates are payable by the owner) in respect of any houses provided or acquired by them under the assisted scheme ; and

(*c*) any other income which in the opinion of the Minister may properly be credited to the said account.

(3.) They shall cause to be debited to the Housing (Assisted Scheme) Revenue Account in each financial year :—

(*a*) the sums required for interest and repayment of principal in respect of all moneys borrowed by them for the purposes of the assisted scheme (including moneys borrowed for the purchase of land which is approved by the Minister as part of the assisted scheme) which in the opinion of the Minister may properly be debited to the said account ;

(*b*) the rates, taxes, rents or other charges payable by them in respect of any land or houses acquired, leased or provided

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by them under the assisted scheme, including any sums payable by way of rent, with the approval of the Minister, to any other account of the local authority, in respect of land acquired by them for some other purpose and appropriated for purposes of the assisted scheme;

(*c*) the annual premium payable by them in respect of the insurance against fire of any houses acquired or provided by them for the purposes of the assisted scheme;

(*d*) the expenditure incurred in respect of supervision and management of the houses acquired or provided by them under the assisted scheme;

(*e*) the expenditure incurred by them in and about the repair or maintenance of any property acquired or provided by them for the purposes of the assisted scheme, whether such expenditure is incurred by way of a fixed annual contribution to a repairs fund or otherwise; and

(*f*) any other expenses which in the opinion of the Minister may properly be debited to the said account.

(4.) (*a*) In the case of the council of a borough whose accounts under the Housing Acts are not otherwise subject to audit by the District Auditor, the Housing (Assisted) Scheme accounts shall be made up and shall be audited by the District Auditor in like manner, and subject to the same provisions, as the accounts of an urban district council, and for this purpose enactments relating to the audit by District Auditors of those accounts, and to all matters incidental thereto and consequential thereon, shall apply, so far as necessary, in lieu of the provisions of the Municipal Corporations Act, 1892, relating to accounts and audit.

(*b*) In every case as soon as practicable after the conclusion of each financial year the local authority shall forward to the Minister a copy of the Housing (Assisted) Revenue Account, certified by the District Auditor.

Art. V.—Except with the approval of the Minister, the local authority shall not borrow moneys for the purposes of an assisted scheme, or a scheme which, in the opinion of the Minister, is likely to become an assisted scheme, at a higher rate of interest than that fixed for the time being in the case

of loans by the Public Works Loan Commissioners to local authorities for the purposes of assisted schemes.

Art. VI.—Subject to the provisions of these regulations and provided that these regulations are complied with the annual payment to be made by the Minister to the local authority out of moneys provided by Parliament (hereinafter referred to as " the Exchequer subsidy ") shall be determined by the Minister as follows :—

(*a*) During the period before any part of the assisted scheme has been carried into effect the Exchequer subsidy shall be an amount equivalent to the deficit in the Housing (Assisted Scheme) Revenue Account made up to the conclusion of each financial year, in accordance with the provisions of Art. IV. of these Regulations.

By the Amendment Regulations, 1925, this provision applied during the period up to and including March 31, 1927.

Art. VII.—(1.) In any determination of the amount of the Exchequer subsidy, whether based on an estimate or otherwise, such deductions may be made from the amount of the deficit upon which the Exchequer subsidy is calculated as will in the opinion of the Minister represent—

(*a*) an item of expenditure or estimated expenditure which is excessive or not properly chargeable to the debit of the assisted scheme ; or

(*b*) the omission from the account or estimate of any item of income which should be included therein ; or

(*c*) any deficiency of income or estimated income which is due to the insufficiency of the rents charged or proposed to be charged by the local authority ; or

(*d*) any deficiency of income or estimated income which is due to the failure of the local authority to secure due economy in the carrying out or administration of the scheme.

Art. IX.—The Exchequer subsidy shall be payable in such instalments as the Minister may think fit (including payments on account, during the periods mentioned in paragraphs (*a*) and (*b*) of Art. VI. of these Regulations, based on the probable deficit for the year as certified by the Local Authority), but the Minister may, if he thinks fit, withhold payment of the

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final instalment of the Exchequer subsidy until the provisions of sub-division (4.) (*b*) of Art. IV. of these Regulations have been complied with.

6. During each of the three years to which the appeal related the Corporation had a deficit on its housing scheme revenue account, and under the Housing, Town Planning, &c., Act, 1919, and the regulations made thereunder, as above mentioned, was entitled to an Exchequer subsidy equal to the amount of the deficit for each of the three years, subject however to the terms of the regulations and, in particular, to disallowances and discontinuance at the instance of the Minister of Health.

For the year 1921–22 the deficit was 115,808*l.* 18*s.* 3*d.*, of which amount 1002*l.* was disallowed by the Minister.

For the year 1922–23 the deficit was 178,374*l.* 9*s.* 7*d.*, of which amount 2708*l.* was disallowed by the Minister.

For the year 1923–24 the deficit was 156,480*l.* 8*s.* 4*d.*, of which amount 2639*l.* was disallowed by the Minister.

The amounts of the Exchequer subsidy payable to the Corporation for the three years were based on the deficits in the revenue account of the housing scheme, and the interest on the loans was only a factor in determining the amounts of the deficits.

In arriving at the amount of the Exchequer subsidy no sums of interest paid by the Corporation on loans raised for the purpose of the scheme were disallowed by the Minister as inadmissible items of expenditure. The sums disallowed were for the most part in respect of general management expenses.

The dates of payment of the instalments of the subsidy did not correspond with the dates of payment of interest on the loans. Some instalments of the subsidy were paid long subsequent to the payment of interest, and certain small amounts of the subsidy were still outstanding for each year.

During each of those years the total taxed profits of the Corporation's property and undertaking paid into the borough fund exceeded the amount of the aggregate interest on loans

payable by the Corporation, including the interest on loans under the housing scheme.

7. It was contended on behalf of the Corporation :—

(1.) That the Exchequer subsidy was paid to the Corporation to make good generally the loss to the borough fund occasioned by the housing scheme.

(2.) That by reason of the difference between the borrowing powers conferred on the local authorities in London and those outside, the facts of this case differed from those in *Dickson* v. *Hampstead Borough Council.* (1)

(3.) That the interest on the loans for the housing scheme was a charge on and lawfully payable and in fact paid out of the taxed income of the borough fund, and that such interest was wholly payable and paid out of profits and gains brought into charge to income tax, and

(4.) That the assessments appealed against should be discharged.

8. It was contended on behalf of the Crown :—

(1.) That for the reasons advanced by the Crown in *Dickson* v. *Hampstead Borough Council* (1), and for other reasons, the interest payable by the Corporation upon loans raised for the purpose of its assisted housing scheme, in so far as such interest exceeded the taxed income from the said scheme, was not payable out of profits and gains brought into charge.

(2.) That the present case was indistinguishable from *Dickson* v. *Hampstead Borough Council.* (1)

(3.) That the assessments should be confirmed.

9. The Commissioners held that the present case was indistinguishable from *Dickson* v. *Hampstead Borough Council* (1), and they accordingly confirmed the assessments under appeal.

Rowlatt J., holding himself bound by his previous decision in *Dickson* v. *Hampstead Borough Council* (2), affirmed the decision of the Commissioners.

The Corporation appealed. The appeal was heard on April 29, 30, and May 1, 1929.

(1) 11 Tax Cas. 691 ; 43 Times L. R. 595. (2) 11 Tax Cas. 691.

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A. M. Latter K.C. and *G. R. Blanco White* for the Corporation.

Sir Thomas Inskip A.-G. and *R. P. Hills* for the Crown.

The arguments sufficiently appear from the Case.

LORD HANWORTH M.R. This case is, at first sight, a somewhat puzzling case, but when it is carefully examined I think the conclusion that we ought to reach is clear.

It is an appeal by the Corporation of Birmingham in respect of assessments made upon them for three years ending April 5, 1922, April 5, 1923, and April 5, 1924. The point that arises in all three of those years is the same. It is sufficient, therefore, to take the first of these years, for the other two years fall into line with the decision upon the first year—namely, the year ending April 5, 1922. The Corporation appeal against an assessment made upon them in that year in respect of a sum of 83,433*l.*

Now the facts must be stated. The Corporation of Birmingham were incorporated under a statute as far back as 1838, and in 1913, since the passing of the Birmingham Act of that year, the Corporation have had one fund only for the purpose of paying the charges which fall to be paid by them. It is called the borough fund, and out of that fund all the expenses that arise in carrying out their duties under the Public Health Acts are to be and are, in fact, paid. There are certain sums which fall to be paid into that fund, and if those sums are deficient in amount, then the fund has to be replenished by raising a borough rate. The sources of revenue besides a borough rate which are paid into the borough fund arise from certain activities which the Corporation carry on in respect of markets, gas, water, electric supply, and tramway undertakings, and, as will be seen from the table which refers to this year and which is attached to the Case, it will be found that in that year from those sources—what are called the trading departments—there was a sum received by the Corporation amounting to 750,449*l.* In order to carry out those activities it has been necessary for the Corporation to borrow moneys

and they have to pay interest on those loans. The interest in this year of which I am speaking amounted to 670,150*l.* It will be seen, therefore, that taking those two figures, it was possible for the Corporation to meet the charges in respect of loans, namely 670,150*l.*, by finding that sum out of the profits derived from their trading funds, which left them, after paying those charges, a sum of 80,299*l.* in hand. In respect of those loans and dividends and interest paid upon them, the Corporation would have the duty charged upon them of collecting the income tax which falls ultimately upon the persons to whom the dividends and interest are paid. It is provided by r. 19 of the General Rules applicable to Schs. A, B, C, D and E, in accordance with the system of deduction of income tax at source, that "Where any yearly interest of money, annuity, or other annual payment . . . . is payable wholly out of profits or gains brought into charge to tax, no assessment shall be made upon the person entitled to such interest, annuity, or annual payment, but the whole of those profits or gains shall be assessed and charged with tax on the person liable to the interest, annuity, or annual payment, without distinguishing the same, and the person liable to make such payment, whether out of the profits or gains charged with tax or out of any annual payment liable to deduction, or from which a deduction has been made, shall be entitled, on making such payment, to deduct and retain thereout a sum representing the amount of the tax thereon at the rate or rates of tax in force during the period through which the said payment was accruing due," and further "The person to whom such payment is made shall allow such deduction upon the receipt of the residue of the same, and the person making such deduction shall be acquitted and discharged of so much money as is represented by the deduction, as if that sum had been actually paid." Taking, therefore, the simple case of the profits which are made by the trading departments and which would be subject to tax, it is right for the Corporation to deduct from the sums which they are paying over to the persons who are entitled to the receipt of those dividends and interest,

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the income tax which has been borne by the profits or gains which have been made and to pass on that tax to those persons. They are bound to allow in respect of the payment to them of the dividend and interest, such deduction upon the receipt of the residue of the dividend and interest, and the person making the deduction, that is, the Corporation, is acquitted and discharged of so much money as is represented by the deduction. That is the simple method of deducting the income tax at the source and passing it on to the person who is ultimately liable to pay it.

Now we come to consider the special facts which raise the question in controversy. It is stated in para. 3 of the Case that in the year ending April 5, 1920, the Corporation prepared and undertook a housing scheme under the provisions of the Housing, Town Planning, &c., Act, 1919. By that Act it was provided, in s. 1, that it should be the duty of every local authority to consider the needs of their area with respect to the provision of houses for the working classes, and within three months after the passing of the Act to prepare and submit to the Local Government Board a scheme for the exercise of their powers under Part III. of the Housing of the Working Classes Act, 1890. The Corporation were a local authority within the meaning of that s. 1, and therefore the duty fell upon them to prepare and submit a housing scheme. Sect. 7 of the Act of 1919 provided that "if it appears to the Local Government Board that the carrying out by a local authority" of any scheme approved under s. 1 of the Act "has resulted or is likely to result in a loss, the Board shall, if the scheme is carried out within such period after the passing of this Act as may be specified by the Board with the consent of the Treasury, pay or undertake to pay to the local authority or County Council out of moneys provided by Parliament such part of the loss as may be determined to be so payable under regulations made by the Board with the approval of the Treasury." Pausing there for a moment, the duty of carrying out the housing scheme attached to the Corporation. On the other hand, they had a right, within

the limits allowed and provided they carried out and fulfilled their duties in accordance with regulations, to ask that the Local Government Board, out of moneys provided by Parliament, should make good such part of the loss as was to be determined as payable. The way in which that money was to be ascertained is set out. The regulations to which I have referred provided that the local authority should secure due economy in the carrying out and administration of a scheme, and they were to deduct from any apparent loss a sum which should represent and be estimated at a value of one penny in the pound, levied in the area chargeable with the expenses of such scheme. By s. 207 of the Public Health Act, 1875 (set out in para. 3 of the Case), it is provided that the expenses incurred in the execution of any of the purposes of the Sanitary Acts should be charged on and defrayed out of the borough fund, and that is the sole fund which is now the source of payment of all matters under the Public Health Acts in the case of the Birmingham Corporation.

The houses which were built under this housing scheme were completed in 1924. But, as will be seen, in consequence of the Corporation having to borrow money for the purposes of this scheme there was a "loss" within the meaning of s. 7, which I have read. The part of the regulations under which one has to ascertain the loss are the regulations which are set out in para. 5 of the Case. Art. IV. provides that for the purposes of an assisted scheme—and this housing scheme is an assisted scheme—the local authority are to keep separate accounts to be called "The Housing (Assisted Scheme) Accounts," and they are to include a separate revenue account, and there was to be credited to that Housing (Assisted Scheme) Revenue Account the produce of a rate of one penny in the pound, because of the loss, which is to be estimated, or such less amount as may be necessary to meet the deficit, and they are to bring into account rents, inclusive of rates, in respect of the houses provided, and any other income which, in the opinion of the Minister, may be properly credited to the account. Then they are to debit

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to the Housing (Assisted Scheme) Revenue Account all sums required for interest and repayment of principal, the rents, rates, taxes and other charges payable by them, the annual premium payable by them in respect of fire insurance, the expenditure incurred in respect of supervision and management, and the expenditure incurred by them in respect of maintenance and repair, and any other expenses which, in the opinion of the Minister, may be properly debited to the account, and in every case, as soon as practicable after the conclusion of every financial year, the local authority are to forward to the Minister a copy of the Housing (Assisted Scheme) Revenue Account certified by the district auditor. Art. VII. (para. 5) deals with the determination of the amount which is to be paid in accordance with s. 7, and it is called the Exchequer subsidy, and in determining the amount of the Exchequer subsidy Art. VII. has to be followed. Such deductions may be made from the amount of the deficit as will, in the opinion of the Minister, represent an item of expenditure which is excessive or not properly chargeable to the debit of the assisted scheme, the omission from the account or estimate of any item of income which should be included therein, any deficiency of income or estimated income which is due to the insufficiency of the rents charged or proposed to be charged by the local authority, or any deficiency of income or estimated income which is due to the failure of the local authority to secure due economy. Then by Art. IX., when all these conditions precedent have been fulfilled, the Exchequer subsidy is to be paid, and paid in such instalments as the Minister may think fit during the periods which are specified.

It is found by para. 6 of the Case that the amounts of the Exchequer subsidy payable to the Corporation for the three years which are in question in the case were based on the deficits in the revenue on the housing scheme, and that the interest on the loans was only a factor in determining the amounts of the deficits. I am bearing that finding of fact in mind. No doubt the interest on the loans was a large factor but not the only factor in determining the amount

of the deficits. If there had not been any interest payable on loans, as a matter of fact it is quite plain that the accounts of the housing scheme would not have shown a deficit at all.

It is contended on behalf of the Corporation, first, that the Exchequer subsidy was paid to the Corporation to make good generally the loss to the borough fund occasioned by the housing scheme. After the facts which I have recounted, is it true to say, as contended by the Corporation, that that was the nature and the purpose of the subsidy paid? The Exchequer subsidy was not paid in regard to the totality of the borough fund at all. From the point of view of the Local Government Board authorities or the Exchequer it mattered not to them whether there was a borough fund or whether there were any other funds. The purpose of the subsidy was to make good the deficit of what is called the Housing (Assisted) Scheme, and at the outset it is right to make it quite plain that this contention that the payment of the Exchequer subsidy was to make good generally a loss to the borough fund, is to mistake the true nature and purpose of the Exchequer subsidy. It was not a subvention to the borough fund as a whole or in relief of rates; but it was a sum paid in respect of the loss incurred out of this assisted housing scheme.

Secondly, it was contended that *Dickson* v. *Hampstead Borough Council* (1) did not apply, and, thirdly, that the interest on the loans on the housing scheme was a charge on the taxed income of the borough fund lawfully payable and in fact paid thereout, and that such interest was wholly paid and payable out of the profits or gains brought into charge by the Income Tax Act. If that contention could have been made good, it would have meant that r. 19 applied. As a matter of fact, what the Exchequer subsidy does is to make good the loss on the housing scheme, and if the sum of the loss is paid out of the borough fund, the borough fund is at once refilled pro tanto by the subsidy. The reason why the Exchequer subsidy is paid is because the scheme is not intrinsically self-supporting. If there had been

(1) 11 Tax Cas. 691.

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no loss on the housing scheme, there would have been no Exchequer subsidy at all, and as is plain from the examination of the figures which are set out in the appendix to the Case, if there had not been a sum of 147,093*l.* 19*s.* 7*d.* payable in respect of dividends and interest on the loans required for carrying out the assisted housing scheme, the assisted housing scheme as it stands would not have shown a deficit and there would have been no Exchequer subsidy. It is said that the loans which were raised were charged upon the borough fund and that the stockholder had a right to look to the repayment of the sum which he had lent, out of the borough fund, at any rate in one resort, if not the last resort. So that the borough fund was the security upon which the stockholder had lent his money. But it is not the security of the stockholder which governs the point in question.

Rule 21, cl. 1, of the All Schedules Rules, which is the rule in question, provides: "Upon payment of any interest of money . . . . charged with tax under Schedule D . . . . not payable, or not wholly payable, out of profits or gains brought into charge, the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of payment." Then cl. 2 provides: "Any such person shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted . . . . as is not paid out of profits or gains brought into charge," and so on. When once the sum is not paid or not wholly paid out of profits or gains brought into charge, then a return must be made. If they have paid the interest on those loans out of the profits or gains brought into charge, then they are entitled to retain the sum so deducted under r. 19. But if they have not so paid them, then under r. 21 they are bound to make a return of the sums which they have so retained, and which were not paid out of the profits or gains brought into charge.

It appears to me, therefore, that the present case is largely a question of fact. When I say that I do not mean a question of fact such as to exclude an appeal to this Court, or a question upon which this Court cannot exercise its discretion. But

it is a mixed question of law and fact, because we have to determine whether or not the Commissioners have rightly advised themselves in coming to their conclusion. But the question undoubtedly arises: From what were these dividends and interest paid? Were they in fact paid out of the profits or gains brought into charge or were they not? In *Sugden* v. *Leeds Corporation* (1) Lord Haldane referred to the judgment of Hamilton J. in the Court below (2) as deciding that the Edinburgh Life Assurance Company, in *Edinburgh Life Assurance Co.* v. *Lord Advocate* (3), "had a perfect right to treat interest as payable out of the income in question," and said that Hamilton J. summed up the law as being that "the person assessed can retain the income tax which he has deducted from the interest paid to his creditor only if the interest is operatively charged upon or payable, that is to say, immediately out of the taxable income." But, in whichever way the matter is put or argued, it ultimately comes back to the question: What was the source from which these dividends or interest were paid? Were they paid out of the profits or gains subject to charge or were they not? Here the Commissioners have adopted a method which is not quite satisfactory. They say that they hold that this case was indistinguishable from *Dickson* v. *Hampstead Borough Council* (4), and they accordingly confirm the assessments under appeal. That, to my mind, is rather a loose way of coming to their decision. It would have been more helpful if they had given us a definite finding that the sum which was paid in respect of the dividends and interest was in fact paid out of profits or gains which had not been subjected to tax. But I think that is what is meant.

Rowlatt J. in the *Hampstead* case says (5): "In other words, what is given here is such a subsidy by the County Council as shall prevent the charge of this interest on any other resources than those resources which belong to the housing scheme from being effective. That is absolutely the position.

(1) [1914] A. C. 483, 495.
(2) (1911) 6 Tax Cas. 231, 240.
(3) [1910] A. C. 143.
(4) 11 Tax Cas. 691.
(5) 11 Tax Cas. 702.

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The thing is calculated so that the other sources which are charged shall never be effectively called upon to provide the money." Applying that to the present case, I think what is intended to be found and held is this, that the Exchequer subsidy was given so as to release any other resources of the Birmingham Corporation from being used for the purpose pro tanto of discharging the interest and dividends and so as to leave all other resources and moneys of the Birmingham Corporation free from the incidence of the burden which was caused by the housing assisted scheme. Rowlatt J., at the end of his judgment in the *Hampstead* case (1), said: "What is really paying and must pay this interest as long as this subsidy is forthcoming is the receipts of the housing scheme plus the subsidy and nothing else, and until the present scheme breaks down it is not payable effectively, as is said in one case, or operatively, as was said in another case, out of any of the other profits and gains of this Corporation." The finding of the Commissioners, therefore, appears to me to mean this, that the dividends and interest were in fact paid out of the Exchequer subsidy and that the other moneys in the hands of the Corporation were released from any burden in respect of the housing assisted scheme. If the Commissioners and Rowlatt J. have rightly directed themselves, that finding is sufficient to make this appeal fail.

But it is said that, on an examination of the cases, inasmuch as the borough fund is ultimately the security, or—to use a phrase of Hamilton J., as he then was, in *Sugden* v. *Leeds Corporation* (2)—if the borough fund is one in which there is a theoretic possibility of its being used for the purposes of payment, it is sufficient. Secondly, it is said that inasmuch as the Corporation have a right to appropriate the payments, they have in fact appropriated to the payment of dividends and interest moneys which they have received out of the property of the trading departments which had been subjected to tax. Let me examine those propositions. It appears to me that the question of the ultimate security is not a determining factor in the present case. In the first of

(1) 11 Tax Cas. 703.

(2) 6 Tax Cas. 211, 241.

the London County Council cases (*London County Council* v. *Attorney-General* (1) there was a sum required to pay the dividend on the Metropolitan Stock amounting to 1,140,000*l.* The Council received about 100,000*l.* in rent and about 500,000*l.* for interest on authorized advances to other public bodies. The balance required to make up the dividend was raised by rates. In their return to the Commissioners of Inland Revenue the Council charged themselves with income tax on the proceeds of rates applied towards the payment of the dividend, but they claimed exemption in respect of the receipt of the money so applied as having been paid out of the profits and gains already brought into charge. In other words, the three sources from which the dividends and interest were paid being rates that had not been subjected to charge, the Council, following the terms of r. 21, accepted the liability of making a return in respect of the sums which they had deducted. It was not suggested that r. 21 could be applied in respect of that balance which was raised by the rates. But what was said by Lord Macnaghten when dealing with the argument was (2): "It was seriously argued that, inasmuch as the holders of Metropolitan Stock have a charge on all the property of the council—capital and income alike —for their interest as well as for their principal, and might in case of default resort to any and every item comprised in their security, therefore it would be right and proper before default, and merely for the purpose of computing income tax, to treat the dividend on Metropolitan Stock as paid rateably out of the capital of the property belonging to the council and the different branches of their income. That is an ingenious, but not, I think, a very businesslike suggestion. It is enough to say that it is the plain duty of the council, not being beneficial owners of the funds which they administer, to keep down annual charges out of annual income so far as it will extend." Again, in *Sugden* v. *Leeds Corporation* (3) Lord Atkinson says: "It must, therefore, I think, be taken that it was, in fact, though possibly not in form,

(1) [1901] A. C. 26. (2) [1901] A. C. 33.
(3) [1914] A. C. 483, 501.

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paid out of gains or profits brought into charge, i.e., the taxed funds of the corporation." The question of whether or not there is ultimate right to recur to the borough fund was not dealt with as a determining factor. Lord Atkinson at the conclusion of his speech said (1): "I express no opinion on what property might, under the Act of 1901, come within the reach of the remedies of the creditors of the corporation in hostile litigation." It appears to me that *Edinburgh Life Assurance Co.* v. *Lord Advocate* (2) gives us a rule or guide which is of great importance in the present case. In that case the company had a very large income from interest, dividends and rents, from which income tax was deducted at the source. The contract of co-partnership of the company provided that every policy of insurance or other obligation should contain a clause declaring that the capital, stock, and funds of the company for the time being should be the only fund answerable for any demand under such policy or other obligation, that is to say, the annuities were charged on the capital stock and funds of the company. In fact, they were paid out of the income derived from interest, dividends, and rents, and what was argued in the House of Lords was that the right way of dealing with the payment of the annuities was to treat them as having partly been paid out of the general income of the assurance company and apportion the sums which had been paid. "There ought, therefore," as was contended on behalf of the Crown (3), "to be an apportionment; one-third of the money payable paid to the annuitants will come out of interest, for interest constitutes one-third of the general fund, and two-thirds of the money so payable will be taken from the premiums, because the general fund to the extent of two-thirds consists of premiums." In other words, inasmuch as there was a charge in respect of the annuities upon the capital stock and funds of the company, so one should bear that in mind and treat the payment of the annuities, not as being wholly paid, as in fact they were paid, out of interest, dividends and rents,

(1) [1914] A. C. 507. (2) [1910] A. C. 143.
(3) [1910] A. C. 151.

but rateably, partly out of the fund to which they could in the ultimate resort go and partly out of the interest, because the premiums were not subjected to tax. In dealing with that proposition it will be observed that in stating the facts of the case Lord Atkinson (1) calls attention to the fact that "the income of the company from all sources is treated as paid into a common fund, from which all outgoings are discharged. And by the 28th article of the contract of co-partnership of the company it is provided, among other things, that every policy of insurance or other obligation entered into by the directors for the behoof of the company shall contain a clause declaring that the capital stock and funds of the company for the time being shall be the only fund answerable for any demand under such policy or other obligation." Following the contentions in the *Edinburgh* case (2) and applying them here, it is said by parity of reasoning that this money received from the Exchequer subsidy goes into the borough fund, that the borough fund is ultimately responsible to stockholders and, therefore, that there ought to be an appropriation, or at any rate a distribution, of the liability in respect of the dividends and interest in accordance with that system under which the stockholder had a right to come upon the borough fund, as the annuity holder in the *Edinburgh* case (2) had a right to come upon the common fund of the insurance company.

Lord Atkinson, in dealing with the first of the London County Council cases (*London County Council* v. *Attorney-General* (3)), to which I have referred, says (4): "The Council were quite willing to pay the income tax deducted on the interest so paid out of the rates, but claimed the right to retain the income tax deducted on the interest paid out of the tax-bearing portion of their income." He then refers to the statement of Lord Davey in *London County Council* v. *Attorney-General* (5), that "the general principle of payment in due course of administration is to pay annual charges in

(1) [1910] A. C. 143, 154.
(2) Ibid. 143.
(3) [1901] A. C. 26.
(4) [1910] A. C. 143, 156.
(5) [1901] A. C. 26, 46.

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the first place out of annual income," and that although there was in that case the contention that inasmuch as the consolidated stock was charged upon the whole funds belonging to the Corporation, in the same way, as pointed out by Lord Atkinson (1), "the question is whether a manipulation such as that by the company of its funds, a setting apart of less than one-third of their taxed income, to pay these annuities, which they can any day readily accomplish, and which if done could not have any effect on their balance-sheet or financial position, is a condition precedent which must be performed in order to entitle them to retain under the provisions of s. 24 of the Income Tax Act, 1888, the sum deducted and now sued for." Then he comes to the conclusion that in fact the interest on the annuities must, under such circumstances, be treated as payable out of the income which has been subjected to tax, so far as it will reach. He, therefore, says that you do not look at the ultimate charge which enables the lender to come down upon the assets of the borrower; but you look to the nature of the fund out of which in fact the interest and dividends are provided. The *Edinburgh* case (2), therefore, decides that where you can show that in fact the payments that are being made are dividends and interest out of taxed income, the Corporation would be entitled to deduct and retain the tax, but not otherwise. It is a clear authority, however, that you are not to consider or mix up the question of what is the ultimate source for the repayment of the capital sum lent. Incidentally Lord Gorell says (3): "It is not required by the Income Tax Acts in order to raise the right of deduction and retention that the interest on annual payments shall be exclusively charged upon or payable out of profits or gains brought into charge. It is enough if the interest is charged upon or payable out of the taxable income, though there may be other subjects of charge. But the mortgagor cannot, of course, retain against the Crown more income tax than he has paid." Once more, in the second of the London County

(1) [1910] A. C. 143, 157. (2) [1910] A. C. 143.
(3) [1910] A. C. 143, 162.

Council cases (*Attorney-General* v. *London County Council* (1)), Lord Macnaghten says : " So it is, if the encumbered owner pays the interest out of his own pocket. But the case is different if the interest is discharged from some other source, and the owner is free."

A consideration of those cases leads me quite clearly to the conclusion that one would be confusing the question of the payment of interest with the ultimate repayment of capital if one brought into consideration the question of what funds form a proper source from which the repayment of the capital can be made. What we have to consider in this case is : Did the money which was received from the Exchequer subsidy, go to the payment of the interest and dividends or did it go as a subvention to the borough fund as a whole ? It appears to me, upon the facts found by the Commissioners and upon the true consideration of what that Exchequer subsidy is, that it is not right to hold that this interest has been paid out of the totality of the borough fund, but out of the subvention which has been handed over to the Birmingham Corporation for that particular purpose. If it were otherwise, in my opinion the Corporation would be doing violence to the purpose for which the money is paid,

Hamilton J., as he then was, deals with this matter in his judgment in the *Sugden* case (2), where after consideration of the statutes under which certain funds reached the Leeds Corporation, he says : " I do not think that can be construed in face of the other provisions as conferring a power to pay the interest on such principal moneys so unified at will out of these different revenues whatever they may be. A power to borrow on mortgage doubtless involves a power to borrow on mortgage at interest, and a charge of the loan doubtless involves a charge upon the subject matter of the security, not only in respect of the principal but of the interest attaching to it. That is not essentially the same thing as giving liberty to the borrower to pay the interest out of any fund that he pleases, even although the lender may, in case of default, have, under the general power to create such a

(1) [1907] A. C. 131, 137. (2) 6 [Tax] Cas. 231, 240.

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security, the right to come for interest as well as principal upon all and any of the sources of revenue, but in face of the provisions in question it not only does not of itself follow that there is such a power for the borrower to apply his revenues at will, but I think he is in this case expressly tied down and prevented from doing so."

In dealing with the question of what has been said to have been "effectively" or "operatively" paid, it seems to me that the decisions which have already been given only use those words for the purpose of finding out what, in fact, was the source of income out of which the dividends and interest were paid. In *Sugden's* case (1) Hamilton J. says: "If the sum of the statutory or other provisions is that in truth and in fact, the taxable income is a fund out of which the debtor, the borrower, either lawfully does, or lawfully might, pay before any default has occurred," then different considerations apply. Then he goes on: "The specific provisions of the Leeds Act, 1901, coupled with the outstanding provisions of the prior Leeds legislation, seem to me to prevent that. I do not think that the application of the income to the purposes in question, the theoretic possibility of which is the foundation of the argument for the Leeds Corporation, is one which is permissible in view of these various sections." In other words, keeping one's attention closely to the purpose for which the Exchequer subsidy is paid, it appears to me that it would be wrong on the part of the Corporation to say that they have received that sum in the borough fund for the general purposes of the Corporation. They have received it marked with a purpose—namely, to meet the possible deficiency arising out of the assisted housing scheme.

There is left the question of whether or not there is a right of appropriation on the part of the Birmingham Corporation, so that they can say: "Well, when once the money has been received, or whether the money has been received or not, inasmuch as we have an income which has been subjected to payment of tax in respect of profits or gains, we are entitled to be deemed to have paid the dividends and interest out of

(1) 6 Tax Cas. 231, 241.

that sum because it is most favourable to us," and certain observations of Lord Atkinson are quoted in support of that contention. To my mind that contention is untenable. It appears to me that, rightly considered, when one looks at the substance of the matter and not at the mere book entries, this subsidy was paid in respect of a particular loss which had been suffered in the assisted housing scheme, a loss which the subsidy was to make good, and that there was no right of appropriation which would leave that fund in the hands of the Corporation. They were bound to use the subsidy for the particular purpose shown in the accounts of the assisted housing scheme and for no other. They would have been failing in their duty if they had used it otherwise. Such observations as are made about appropriation do not apply to the present case. This sum is a sum which has been placed in the Corporation's hands for a particular purpose—namely, for paying the loss which appears in the accounts of the assisted housing scheme, a loss which would not have occurred at all if this sum for dividends and interest had not been payable, and it is a sum which must be appropriated for that purpose and no other. It is unfortunate that in some of the reported cases words are used in a different connection which, when taken from their purpose in relation to the facts of the case, may be construed as having a wider significance than they actually have. They do not, to my mind, apply to this case, and when one has examined them it appears to me that the principles laid down in the *Edinburgh* case (1), the first and second *London County Council* cases (2), and the *Leeds Corporation* case (3) by Hamilton J., as he then was, clearly show that there can be no such appropriation, that one must leave out of account the general nature and purpose of the borough fund, and treat this sum as a sum which has been placed in the hands of the Corporation for the purpose of discharging this heavy toll upon them in respect of borrowed moneys.

For these reasons, although the judgment of Rowlatt J.

(1) [1910] A. C. 143. (2) [1901] A. C. 26; [1907] A. C. 131.
(3) 6 Tax Cas. 231, 240.

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is expressed in terms of a reported case, and not otherwise, I think the intention of the Commissioners was to hold that in fact the money had been paid, as it ought to have been paid, out of moneys which had not been subjected to tax, and therefore that the case fell under r. 21, and thus that the Corporation were bound to make a return in respect of those moneys, and there is a liability upon them in each of these three years. The question of amount is not in dispute, so I need not dwell upon that. As the result of this judgment the appeal must be dismissed with costs.

LAWRENCE L.J. This is in effect an appeal against the decision of Rowlatt J. in *Dickson* v. *Hampstead Borough Council* (1), which admittedly governs the present case. The Birmingham Corporation contended before us that the interest on the loans for their housing scheme was a charge upon and lawfully payable (and in fact paid) out of the taxed income of the borough fund, and consequently that such interest was wholly payable and paid out of profits or gains brought into charge to income tax within the true meaning of r. 19 of the All Schedules Rules under the Income Tax Act, 1918. This contention was based on the assumption that the Exchequer subsidy was in fact paid to make good the loss alleged to have been occasioned to the borough fund generally by reason of the Corporation having undertaken a housing scheme under the Act of 1919. The Crown disputed the contention of the Corporation on the ground that the Exchequer subsidy was paid to the Corporation for the sole purpose of making good the loss resulting from the carrying out of the housing scheme and contended that it was the duty of the Corporation to apply such subsidy in making good that loss and not any alleged loss to the borough fund generally. The Crown relied upon r. 21 of the All Schedules Rules, and contended that, in the circumstances of this case, the interest on the loans for the housing scheme was not wholly payable out of profits or gains brought into charge to income tax, but that it was only payable out of such

(1) 11 Tax Cas. 691.

profits or gains to the extent to which such profits or gains consisted of the taxed income arising from the housing scheme, and that as to the balance it was payable out of, and ought to be borne by, the subsidy, and consequently that the Corporation was to the extent to which the interest was payable out of such subsidy, bound to account to the Crown for the income tax deducted in respect of that portion of the interest.

The Exchequer subsidy is payable under the Housing, Town Planning, &c., Act, 1919. Under that Act it was the duty of the Corporation to prepare and carry out a housing scheme, and under s. 7 the Local Government Board was bound to pay to the Corporation out of moneys provided by Parliament such part of the loss resulting from the carrying out of the scheme as might be determined under regulations made by the Local Government Board.

The regulations made by the Local Government Board under this section oblige the Corporation to keep separate accounts of the housing scheme and to specify what is to be debited and credited to such account. The deficit shown on such separate account determines the amount of the loss which the Board has to pay to the Corporation. It is plain from these regulations that the loss is calculated on the footing that the receipts of the Corporation from their trading departments and their other sources are not to be brought into account, and that the Exchequer subsidy is not measured by, and has no relation to, any alleged loss to the borough fund generally. Moreover, in calculating the deficit, the total amount of interest on loans for the housing scheme, without making any allowance for the deduction of income tax, is debited to the housing scheme account.

The obvious intention of the Legislature in providing the Exchequer subsidy was to ensure that any loss which might result from the carrying out of the housing scheme (upon which the local authority were compelled to embark) should not be thrown upon or become payable out of the general revenue of the local authority. It would be strange if, in these circumstances, the local authority were entitled to

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take the subsidy and then to say: "We will not apply it to make good the deficiency in the housing scheme account in respect of which it is paid, but as we have sufficient taxed income from other sources out of which we can pay such deficit, we will apply such taxed income in making good the deficit and apply the subsidy to recoup so much of our taxed income as we have applied for that purpose." If this method of dealing with the subsidy were justified, the result, as pointed out by Rowlatt J. in the *Hampstead* case (1), would be that, to the extent to which the Corporation deduct income tax from the interest paid by them on their housing loans out of their taxed income, they are recouping themselves the income tax paid on their taxed income, and thus escape from the payment of any income tax on the income so applied. In other words, the Corporation are using the machinery of r. 19 for the purpose of collecting the income tax payable by the lenders, and are claiming to retain the income tax so collected for their own benefit. Such a proceeding is, in my opinion, contrary both to the letter and the spirit of rr. 19 and 21 of the All Schedules Rules.

The Corporation, however, seek to justify this method of procedure by pointing out that, since the passing of their Local Act of 1913, they have only one fund—namely, the borough fund, into which all moneys payable to them, including both the profits from their trading departments and the Exchequer subsidy, are paid, and out of which the general expenses of the execution of the Public Health Acts (including by virtue of s. 65 of the Housing of the Working Classes Act, 1890, the expenses incurred by them in the execution of that Act) are payable. Consequently they say that the interest on the housing loans is payable out of the borough fund, which is a mixed fund of taxed income and untaxed income, and so long as the taxed income is sufficient to meet the interest payable on the housing loans they can appropriate the payment of such interest to such taxed income.

In support of this proposition the Corporation rely mainly upon two passages in the speech of Lord Atkinson in *Sugden*

(1) 11 Tax Cas. 691, 703.

v. *Leeds Corporation*. (1) The first is (2): "When the interest and annuities so charged"—that is charged to income tax—"may with equal legality be paid out of either the 'taxed' or 'untaxed' fund of the debtor, and the taxed fund is adequate in amount to pay them, it will not be necessary for the debtor, in order to entitle him to retain for his own benefit the entire sum deducted, that he should have in his books or otherwise specifically appropriated or set apart the taxed fund to discharge this interest or these annuities, or to prove that he had in fact paid them out of the 'taxed fund.' It will suffice, should the two funds be blended and formed into a mixed fund, that the interest and annuities charged should be paid out of this mixed fund. They will, if so paid, be treated as having been paid out of the taxed fund, especially where, in the ordinary course of business, it should be applied for that purpose." The second is (3): "In my view, therefore, the right of the debtor who has paid 'interest or annuities' brought into charge to the income tax to retain for his own benefit the amount of the tax he has deducted from his creditors depends upon whether he can answer in the affirmative each of the two following questions:—(1.) Have the interest and annuities been, in fact, paid, or must they, in the circumstances of the case, be taken to have been, in fact, paid out of 'profits or gains brought into charge,' i.e., out of the so-called 'taxed fund'? (2.) Was it lawful to pay them out of that fund? If either of these questions be answered in the negative, he must account to the revenue for the tax he has deducted. This is, I think, the only workable rule which can in practice be applied." The Corporation also rely upon *Edinburgh Life Assurance Co.* v. *Lord Advocate* (4) and *Sterling Trust, Ld.* v. *Inland Revenue Commissioners* (5), which affirmed the principle enunciated in *Sugden's* case (6) by Lord Atkinson in the passages which I have read, that where interest is properly payable

(1) [1914] A. C. 483.
(2) Ibid. 499.
(3) Ibid. 506.
(4) [1910] A. C. 143.
(5) (1925) 12 Tax Cas. 868.
(6) [1914] A. C. 483, 499, 506.

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out of a blended fund, consisting of taxed and untaxed income, the debtor can appropriate the payment of interest to the taxed income notwithstanding that such income has been specially set apart for that purpose.

In my judgment none of the cases so relied upon applies to the facts of this case. The fallacy which in my opinion underlies the whole of the Corporation's argument consists in treating the Exchequer subsidy as a receipt on general revenue account and not as a sum of money earmarked to meet the particular loss on the housing scheme and paid for the express purpose of preventing that particular loss from falling upon the general revenue of the Corporation.

In the special circumstances of this case, I am of opinion the interest on the housing loan is not, to use the expression employed by Lord Haldane in *Sugden's* case (1), "operatively and effectively charged" upon the borough fund generally, but upon the profits or gains of the housing scheme, the penny rate and the Exchequer subsidy. The fact that in the event of the Corporation making default the lenders may have a charge upon the whole of the revenues of the Corporation does not assist the Corporation's case: see the observations of Lord Macnaghten and Lord Davey in *London County Council* v. *Attorney-General*. (2) Nor have we in the present case to determine what might happen if the Corporation were to fail to carry out their obligation to forward to the Minister a certified copy of the housing account, and by reason of such default the Board were to decline to pay the Exchequer subsidy.

For these reasons, which are in substance the reasons given by Rowlatt J. for his decision in the *Hampstead* case (3), with which I agree, I am of opinion that this appeal fails, and should be dismissed with costs.

SANKEY L.J. I agree. In my view rr. 19 and 21 are not in the nature of substantive law imposing the tax, but rather in the nature of adjective law facilitating its collection. To ensure this object, they provide for the collection of the tax

(1) [1914] A. C. 497. (2) [1901] A. C. 26, 33, 46.
(3) 11 Tax Cas. 691.

at the source and for preventing a person paying tax on a sum which is not really his income: see the remarks of Lord Gorell in *Edinburgh Life Assurance Co.* v. *Lord Advocate* (1), where, referring to Lord Macnaghten's judgment in *London County Council* v. *Attorney-General* (2), he says: "He (Lord Macnaghten) points out how they authorize a person who has paid income tax on what is not really available income, because it includes money which he has to pay over to some one else, to deduct and retain the tax upon that payment." If that was the object of the rules it would, in my opinion, be a strange result, if they enabled a man to escape payment of tax upon profits in respect of which, apart from the rules, he would have to pay.

I quite agree, however, that the decisions show that this result may follow in certain cases, because of the taxpayer's right of appropriation. But in my view those cases are exceptional, and whenever this question arises, the facts must be carefully and accurately ascertained before the law is applied to them.

I doubt whether it is possible to lay down any principle which will be found to cover all the cases as they arise. Lord Atkinson in *Sugden* v. *Leeds Corporation* (3) formulated certain rules which sum up the results of the decisions up to date. I especially refer to r. 3 which says: "When the interest and annuities so charged may with equal legality be paid out of either the 'taxed' or 'untaxed' fund of the debtor, and the taxed fund is adequate in amount to pay them, it will not be necessary for the debtor, in order to entitle him to retain for his own benefit the entire sum deducted, that he should have in his books or otherwise specifically appropriated or set apart the taxed fund to discharge this interest or these annuities, or to prove that he had in fact paid them out of the 'taxed fund.' It will suffice, should the two funds be blended and formed into a mixed fund, that the interest and annuities charged should be paid out of this mixed fund. They will, if so paid, be

(1) [1910] A. C. 143, 160. (2) [1901] A. C. 26, 38–40.
(3) [1914] A. C. 483, 499.

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treated as having been paid out of the taxed fund, especially where in the ordinary course of business it should be applied for that purpose." I think that perhaps the learned Law Lord pronounced dicta in his speech which were not necessary to the decision of the case; but accepting loyally his r. 3, it still remains to be considered: What is a mixed fund, and is the fund in this case, the borough fund, a mixed fund within the meaning of Lord Atkinson's rule?

This leads to the real points in the case: (1.) What was the purpose and nature of the subsidy? and (2.) Was the borough fund a mixed fund? Upon those questions many facts have to be considered and weighed. I do not propose to examine all of them, but I wish to refer, before discussing some of them, to the remarks of Lord Haldane L.C. in *Sugden* v. *Leeds Corporation*. (1) He says: "My Lords, I am unable, after consideration of these sections, to arrive at the conclusion of the Master of the Rolls, that the interest on the loans is no longer presently payable out of the net receipts of the particular undertakings to which they belong, and that the net receipts cannot be earmarked for that purpose. What may happen if there is default and a question of ranking has arisen we are not called on to determine. In the meantime and pending that event I think that no other income than the profits of the several undertakings and properties is operatively and effectively charged with the payment of the interest on the various loans." What was the object of the subsidy? It was earmarked for a particular purpose—namely, subject to certain regulations to pay the loss incurred by the Corporation in their housing scheme over and above that which could be met by a penny rate.

Some of the facts to be taken into consideration are the following:—(1.) That the borough fund is one fund—see para. 2 of the Case which says: "Since the passing of the Local Government Act, 1913, the Corporation has had one fund only, the borough fund, and any deficiency in that fund is met by raising a borough rate"; that is a fact to some extent in favour of the Corporation—and (2.) That

(1) [1914] A. C. 483, 497.

the housing loan was secured upon all the revenues of the Corporation—see para. 4 of the Case which says: "In each case the loan was secured on all the rates, revenues, and property of the Corporation and in the case of local bonds, the rates, revenues, and property of the Corporation were expressed to include 'the grant to be paid by the Government in aid of the housing scheme.'" That might be an ultimate and not an operative charge. That to some extent may be a fact to be considered in favour of the Corporation; but personally I think not, in view of the words of Lord Haldane, to which I have already referred. Thirdly, it will be noted that in the regulations of the subsidy, the accounts are to be kept separate and the scheme is segregated. Upon those considerations I refer to two passages in the judgment of Rowlatt J. in *Dickson* v. *Hampstead Borough Council*. (1) The first is that in which the learned judge says (2): "The whole point here is that the untaxed money which this Corporation gets should go to supply the deficiency of the profits and gains which are here in question, because it is calculated on the very footing that those other profits and gains are not to be brought in. In other words, what is given here is such a subsidy by the County Council as shall prevent the charge of this interest on any other resources than those resources which belong to the Housing Scheme from being effective." Then later he adds (3): "If what is contended for can be done here it would simply mean that the Corporation would be enjoying the profits and gains of the electrical undertaking to some extent free of income tax."

Now I do not for a moment say that this is a question of fact upon which the decision of the Commissioners is final; it is a question of mixed law and fact and of the proper legal inference to be drawn from the facts. No doubt the decided cases lay down valuable rules as to the interpretation of the various sections, but, as above stated, before applying the law the facts must be accurately ascertained.

On a consideration of all the facts of this case as to the

(1) 11 Tax Cas. 691. (2) 11 Tax Cas. 702.
(3) 11 Tax Cas. 703.

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purpose and nature of the subsidy and the regulations applicable to it, I have come to the conclusion that the borough fund in this case was not such a mixed fund as Lord Atkinson referred to in his third rule.

I think the *Hampstead* case (1) is indistinguishable from the present case, that it was rightly decided, and that this appeal should be dismissed.

Appeal dismissed.

Solicitors for Corporation: *Sharpe, Pritchard & Co., for F. H. C. Wiltshire, Town Clerk, Birmingham.*

Solicitor for Crown: *Solicitor of Inland Revenue.*

W. I. C.

1929 *April* 9, 10.

DAVIES *v.* PROPERTY AND REVERSIONARY INVESTMENTS CORPORATION, LIMITED.

Landlordand Tenant—Distress—Notice—Validity—2 W. & M., sess. 1, *c.* 5, *s.* 2.

A notice of distress which specifically sets out each article that has been distrained, or which, while not specifically setting them out, is to be interpreted as meaning that all the goods on the premises have been distrained, is good.

A notice which, after setting out certain specified articles, continued "and all other goods upon the premises (unless specially exempt) sufficient to satisfy the amount of this distress":—

Held, bad.

Kerby v. *Harding* (1851) 6 Exch. 234 followed.

Wakeman v. *Lindsey* (1850) 14 Q. B. 625 explained.

APPEAL from an Official Referee.

The plaintiff was tenant of a flat of which the defendants were the landlords. Rent being in arrear, a distress was levied by a certificated bailiff, and a notice under s. 2 of 2 Will & Mary sess. 1, c. 5, was in the ordinary course served on the plaintiff. The material part of the notice was as follows: "Take notice that by virtue of an authority to me given I have this day seized and distrained the goods and chattels specified in the following inventory . . . . Sitting room [various articles—e.g., carpet, 2 bookcases, sideboard] Bedroom [various articles, e.g.,

(1) 11 Tax Cas. 596.

four pictures, wardrobe] and all other goods upon the premises (unless specially exempt) sufficient to satisfy the amount of this distress and expenses." This was signed by the certificated bailiff and dated May 2, 1927. Goods not specifically named in the notice but coming within the concluding words of the notice were sold under the distress. The plaintiff brought an action against the defendants claiming damages for illegal distress which was referred to an Official Referee. The Official Referee held that the sale was illegal on the ground that the above notice was insufficient.

The defendants appealed.

Eddy and *Eric Neve* for the defendants. The notice of distress with inventory attached was a good notice under the Act. The words of the Act should be construed according to their ordinary meaning, and they are that "notice thereof," i.e. of the distress, must be given. "The intent of the Act was only, that the party should have notice": *Walter* v. *Rumbal* (1); and the forms of the notices regularly used by bailiffs show that in practice it has been considered sufficient to let the tenant know that his goods have been distrained without mentioning specifically all the articles seized. It is hoped that a decision will be given which will settle the practice for the guidance of bailiffs throughout the country.

The authorities on the whole support the defendants' contention. In *Cole* v. *Davies* (2) it was held that a seizure under a fi. fa. of part of the goods in the name of all was a seizure of all. In *Swann* v. *Falmouth* (*Earl*) (3) a notice of distress setting forth "the following goods and chattels, to wit, a quantity of coals now lying in heaps on Point Quay .... a quantity of slate ditto, a quantity of balk ditto" was held good. In *Wilson* v. *Nightingale* (4), where it was held for the first time that the notice must be in writing, it was not suggested that the inventory must contain all the things seized. The two cases most in point are *Wakeman* v.

(1) (1695) 1 Ld. Ray. 53, 54.
(2) (1698) 1 Ld. Ray. 724.
(3) (1828) 8 B. & C. 456.
(4) (1846) 8 Q. B. 1034.

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Lindsey (1) and *Kerby* v. *Harding*. (2) In the former case (1) the inventory enumerated, "One clock and weights, etc., etc., and any other goods and effects that may be found in and about the said premises, to pay the said rent and expenses of this distress." This was held to be sufficient, because it appeared that the distress was meant to include all the goods on the premises. On the other hand in *Kerby* v. *Harding* (2), the inventory, having mentioned various articles specifically, continued: "and all other goods, chattels, and effects on the said premises that may be required in order to satisfy the above rent," and this was held to be bad as being too vague. The distinction between the notices in these two cases is so fine as to be immaterial, and *Kerby* v. *Harding* (2) ought to have followed *Wakeman* v. *Lindsey* (1) and was wrongly decided. It is to be noted that in the former case (2) the goods seized under the general words of the notice were those of a stranger and not those of the tenant. The present notice is substantially the same as that in *Wakeman* v. *Lindsey* (1), which should be followed.

[*Salisbury Supply Co.* v. *Pitkin* (3) was also referred to.]

Derbyshire K.C. and *Fox-Andrews* for the plaintiff. *Kerby* v. *Harding* (2) is relied on and it is not desired to add anything further.

[*Sims* v. *Tuffs* (4) and *Bishop* v. *Bryant* (5) were also referred to.]

TALBOT J. This is an appeal from part of the judgment of one of the Official Referees holding that on a distress levied in respect of rent due from the plaintiff to the defendant company for a flat of which he was the tenant, the sale of part of the goods distrained was illegal for want of notice sufficient to comply with the statute of William and Mary.

The plaintiff was tenant of a flat in Bloomsbury, and the quarter's rent due at Lady Day, 1927, was unpaid, amounting to 32*l*. 10*s*. On May 2 of that year a distress was levied by a

(1) 14 Q. B. 625.
(2) 6 Exch. 234.
(3) Nov. 15, 16, 23, 1927. Unreported.
(4) (1834) 6 C. & P. 207.
(5) (1834) 6 C. & P. 484.

certificated bailiff on the premises and a notice purporting to be the notice required by 2 Will. & Mary, sess. 1, c. 5, was in the ordinary course drawn up and served upon the plaintiff. It is on an ordinary form, most of it in print, and acquaints the tenant with the fact that the bailiff has seized and distrained goods and chattels specified in the following inventory. Then it sets out the premises. Then it adds, in the ordinary form: "Further take notice that unless the said rent be paid together with the expenses of distress or the goods and chattels be replevied within five days from the date hereof they will be sold according to law in that case made and provided." Then the inventory follows below the signature of the bailiff, and it sets out various articles of household furniture, adding a note under a later date—namely, May 10: "The above goods have been removed to No. 13 High Holborn for sale by auction." That again is signed by the bailiff; and last of all there follow these words: "and all other goods upon the premises (unless specially exempt) sufficient to satisfy the amount of this distress and expenses." Various goods, including part of those which are specifically mentioned in that notice, and also other goods which are not specifically mentioned, were accordingly sold on May 20, and the amount due for rent was realized by that sale and no doubt paid to the defendants, and also the expenses. The point raised in this action is that, so far as relates to the goods not mentioned by name in the notice, that sale was illegal, because no notice of distress, so far as those goods are concerned, had been given to satisfy the requirements of the Act of William and Mary. Of course it is well known that that Act was passed in the interest of landlords, to add to their facilities for recovering rent by enabling them to do that which, before the Act was passed, they could not do—namely, sell goods taken in distress. Before that Act, all the right they had was to detain them as pledges, as the preamble says, for enforcing the payment of the rent; and the preamble goes on to add that "persons distraining have little benefit thereby"; and it was in order to give them more benefit that this Act was passed. It enacts by s. 2 that: "where any goods or chattels shall be

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distrained for any rent reserved and due upon any demise, lease, or contract whatsoever, and the tenant or owner of the goods so distrained shall not within five days next after such distress taken, and notice thereof (with the cause of such taking) left at the chief mansion house," and so on. Then: "after such distress and notice as aforesaid, and expiration of the said five days, the person distraining shall and may" —then various formalities. Then: "cause the goods and chattels so distrained to be appraised," and after such appraisement shall and may lawfully sell them to the amount specified of the rent for which the said goods and chattels shall be distrained, and charges, and so on. It is obvious, therefore, that it is a condition precedent to the right of the landlord to avail himself of the indulgence given by this statute, that he should have done what the statute requires, the object of which is perfectly plain—namely, that the goods shall not be sold until the owner of the goods or the tenant of the premises shall have had an opportunity of replevying and giving proper security. The question therefore is whether the notice which has been given in this case, the material parts of which I have read, is a notice of distress (the words of the Act being "notice thereof") within the meaning of the Act of Parliament. The learned Official Referee has decided that as to goods which are only covered, if they are covered at all, by the words at the foot of the notice "and all other goods upon the premises (unless specially exempt) sufficient to satisfy the amount of this distress and expenses," this is not a good notice within the statute of the goods taken, which is what the statute requires it to be a notice of.

It is obvious that if this matter were res integra this is a question which might permit of very considerable debate, and it might well be said that there are two alternative meanings which can be given to the statute: (1.) that every article distrained and intended to be sold or as to which the power of sale is claimed or reserved, must be specified in the way in which things are specified in a detailed inventory. I gather from Mr. Derbyshire that that was so decided at nisi

prius, in two cases (1) before the case of *Wakeman* v. *Lindsey* (2), to which I will come in a moment. That would be one alternative. Of course that would be the most complete and businesslike way of giving the tenant or the owner of the goods, as the case might be, exact notice of what goods of his, or what goods on the premises in the case of the tenant, were in peril.

The other alternative would be that it is not necessary to give a detailed inventory or a detailed description of anything, but that it is enough to say: "I have distrained all the goods on the premises, and they will be sold if you do not replevy them." That is a matter that has not been argued and one which may arise some other time. It might be said those are the two alternatives and that one must adopt one or the other, and it is obvious that there are arguments for and against both, both on the actual wording of the statute (perhaps the only thing that can be considered) and on the convenience and reasonableness of the matter.

The embarrassment which has been caused here is that there are two cases in which this precise point was dealt with, that is, the meaning of the words "notice thereof" in the statute of William and Mary. There are two cases in which the Courts—both Courts of great authority—have had to consider whether a notice very much resembling in general form the notice in this case was a sufficient compliance with the statute.

The cases are *Wakeman* v. *Lindsey* (2) and *Kerby* v. *Harding*. (3) In *Wakeman* v. *Lindsey* (2) the action was, as it is here, for an illegal sale of goods distrained, and on the ground, as here, that the notice did not cover the goods sold. The form of the notice is set out in the report. (4) After a very short inventory, the whole of which was this: "Tap room, one clock and weights, etc., etc.," it went on: "and any other goods and

(1) *Sims* v. *Tuffs*, 6 C. & P. 207, and *Bishop* v. *Bryant*, 6 C. & P. 484.
(2) 14 Q. B. 625.
(3) 6 Exch. 234.
(4) 14 Q. B. 627.

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effects that may be found in and about the said premises"; then there is a comma, for what it may be worth; then: "to pay the said rent and expenses of this distress." The case was tried by Erle J. (afterwards Chief Justice), and it was submitted that the notice was defective and legally no notice, and on that point the learned judge is recorded to have agreed with the counsel for the defendants, and to have held that the notice was sufficient in law. As has been pointed out in the argument which we have heard from the learned counsel for the appellant, it was assumed by the Court of Queen's Bench, in which the rule was moved and granted, that the intention was to distrain everything on the premises. But the Court evidently felt very great difficulty about the case, and I should gather from the judgments that it was new and surprising to them that a notice in this form should be adopted. Patteson J., who, of course, was a judge of very great experience and learning, uses the expression (1), "The wording of this form is extraordinary," and he criticizes it. Then he says: "Perhaps the fair interpretation may be, all that are there; and, if in fact the broker has taken everything without exception, the practice may be very bad and loose, but I cannot say that it vitiates the sale." Coleridge J. is perhaps still more doubtful about it. He says (2): "I have felt doubt, and decide with reluctance." He says: "The object of [the] statute 2 Will. & Mary, c. 5, s. 2, was that the party distrained upon should have notice of what was taken," and he says that in his opinion the language of the notice in that case was not fair notice. He goes on, as did Patteson J., to say that the landlord distraining "may assume that the tenant knows sufficiently what [the goods distrained] are, and that to say 'all' is enough. I do not feel justified in laying down that, in such a case, there must be a specification." He decided with very great hesitation and evidently with great disapproval of the form which had been adopted. Erle J., who had originally tried the case, gave the last judgment, and he also expresses his dislike of the form of words. He

(1) 14 Q. B. 631. (2) 14 Q. B. 632.

says (1): "There is evil in the use of such forms; yet there may be more if a landlord is held liable to an action for the use of words somewhat too general, and if it is rendered necessary that at the time of making a distress every thing must be brought out for the purpose of being described and numbered." Then his final words are very material, I think, because they illustrate or define the difference between *Wakeman* v. *Lindsey* (2) and the case of *Kerby* v. *Harding*. (3) He says: "The word 'all' does give a description; so far that, if all be more than is required, the landlord is in peril for having taken too much." It is, of course, perfectly true in a sense that the word "all" does give a description; that is to say, however tedious the process may be, if one says one has taken all the goods on the premises, then it is only a question of going through them one by one and one finds exactly what has been distrained.

Then we come to the other case: *Kerby* v. *Harding*. (3) It is upon this that the learned Official Referee has decided the present case, and in his opinion—and perhaps there are not many opinions on such a point which are entitled to more weight—it is indistinguishable from the case which is now before the Court. That was an action, in substance, for selling goods without a proper notice under the statute. The words of the notice (4) are not unlike the words of the notice in *Wakeman* v. *Lindsey* (5), but they are different. They are general words after some particular chattels enumerated and described—namely, "and all other goods, chattels, and effects on the said premises that may be required in order to satisfy the above rent, together with all the expenses." This case was tried before Parke B. It is needless for me to say anything about the authority of Parke B. He had tried the case in the first instance, and he also gave the considered judgment of the Court upon the rule. What happened at the trial was this. The defendant said that *Wakeman* v. *Lindsey* (2) was an authority in favour of

(1) 14 Q. B. 633.
(2) 14 Q. B. 625.
(3) 6 Exch. 234.
(4) 6 Exch. 238.
(5) 14 Q. B. 627.

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the sufficiency of the notice and that it was precisely in point; and so fine is the distinction between the two cases that Parke B., upon that authority being cited to him, ruled that the notice was sufficient; and it was upon that ground that the rule nisi for a new trial on the ground of misdirection was obtained, the jury having found a verdict for the defendant.

From the report of the argument, it appears that the same points were discussed there as have been discussed here. The learned counsel who appeared in support of the rule had to deal, of course, with *Wakeman* v. *Lindsey* (1), and he said this (2): "The case of *Wakeman* v. *Lindsey* (1), when examined, will be found very distinguishable from the present. The notice there included all the goods on the premises, whilst the present notice leaves the particular goods seized in uncertainty." That was the argument, and that, in substance, is the ratio of the decision given by the Court.

I pause for a moment to call attention to the very great authority of *Kerby* v. *Harding* (3), a decision on the precise point which is raised in the present appeal. We have the decision in *Wakeman* v. *Lindsey* (1) on facts so similar that Parke B. accepted that judgment as decisive of the case before him. His ruling was challenged before the Court of Exchequer, of which Parke B., I gather, was President, for the report does not say that the Chief Baron (4) was present—and he delivered the judgment. Having heard this matter fully argued, and of course there having been much more opportunity of considering it than there had been at nisi prius, he came to the conclusion that he had been wrong in following the case of *Wakeman* v. *Lindsey* (1), and that that case was distinguishable from the case then before the Court. One can hardly imagine a stronger decision, because not only is there the great authority of the Court of Exchequer of 1851, but

(1) 14 Q. B. 625.
(2) 6 Exch. 238.
(3) 6 Exch. 234.
(4) Sir Frederick Pollock. [It was a considered judgment: the report does not show who were the judges concurring with Parke B.]

there is the fact that Parke B., certainly one of the most learned and accurate judges who ever sat in an English court, came to the conclusion, on argument, that he had been wrong in his direction at nisi prius, and gave judgment making the rule absolute for a new trial. I think the grounds upon which he did that are stated, as they always are in Parke B.'s judgments, with perfect lucidity and freedom from ambiguity. He had to deal there with the words which I have already read: "and all other goods, chattels, and effects on the said premises that may be required in order to satisfy the above rent, together with all the expenses."

I will read three or four passages from the judgment which show, I think, perfectly clearly what the decision was. Parke B. says (1): "Upon consideration, we think that the terms of this notice are too vague, and do not point out any certain goods, chattels, or effects, except those which are before enumerated, which are the subject of the distress." Then he calls attention to the statute, and a little lower down he says: "It appears to us the statute not only requires the cause of taking to be mentioned, but also a notice to be given 'thereof,' that is, of the distress taken, which must include every thing taken." Then he refers to the fact that before the statute no notice at all was necessary, and he goes on (2): "This statute clearly requires some notice of the taking; and we think that, according to the reasonable construction of the statute, the notice ought to inform the tenant or the person whose effects are taken, by expressing what are the goods taken, and also what is the amount of rent in arrear. The general description, 'any other goods, chattels, and effects on the premises, or in and about the premises,' according to the decision of the Queen's Bench (3), is sufficient."

That is, I think, a perfectly accurate description of the decision in *Wakeman* v. *Lindsey*. (4) Whether the Court were right or wrong in reading the notice there as having that meaning is another matter and quite unnecessary for

(1) 6 Exch. 240.
(2) Ibid. 241.
(3) In *Wakeman* v. *Lindsey*, 14 Q. B. 625.
(4) 14 Q. B. 625.

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us to consider here, but it is quite clear that they decided that it was a good notice because they construed the notice as meaning that all the goods were taken; and if it did mean that, then, in the words of Erle J., the word "all" does itself give a description which covers everything that is on the premises; and that, Parke B. says in *Kerby* v. *Harding* (1) was the decision in *Wakeham* v. *Lindsey*. (2) He continues (1): "But this notice does not impound all the goods on the premises, but only the goods, chattels, and effects that may be required in order to satisfy the rent mentioned in it. This notice leaves it uncertain what goods are taken; and therefore we think that it is not sufficient, and that the subsequent sale of any of the articles not included nominatim in the inventory itself is an illegal sale, for which the defendants are responsible." Parke B. meant that the tenant or the owner of the goods would be unable to put his hand on any particular chattel and say: This is taken, or is not taken.

There is no doubt—it is sufficiently obvious from the argument to which we have listened—that these two cases leave the law in a somewhat unfortunate and inconvenient condition; but if the ordinary principles upon which cases are to be weighed are to be observed it is impossible to see how light can be more decisively obtained from a decision than from the decision of *Kerby* v. *Harding*. (3) Not only, as I have said, is it a case of the very greatest authority, but it deals specifically with *Wakeman* v. *Lindsey* (2), which is compared with it, and which appears on its face to be in conflict with it, and states in perfectly clear terms what the difference between them is.

In my opinion, it being quite clear that we ought to follow *Kerby* v. *Harding* (3), the only question is whether it can be distinguished from the case before us. Of course, unless the words are absolutely the same, one can always suggest some ground of distinction, but the question is whether there is any real ground of distinction. The words in *Kerby* v. *Harding* (4) are: "All other goods, chattels, and effects on

(1) 6 Exch. 241.
(2) 14 Q. B. 625.
(3) 6 Exch. 234.
(4) 6 Exch. 235.

the said premises that may be required in order to satisfy the above rent, together with all the expenses." The words here are: "And all other goods upon the premises (unless specially exempt) sufficient to satisfy the amount of this distress and expenses." The words are not the same, but for my part I can see no distinction in meaning between "all . . . . goods . . . . that may be required in order to satisfy the above rent" and "all . . . . goods upon the premises . . . . sufficient to satisfy the amount of this distress." They mean precisely the same thing; and if it be true, as the Court of Exchequer said, that the notice in *Kerby* v. *Harding* (1) left it uncertain what goods were taken, so, in my opinion, does the notice here.

I should like to add that the fact that the learned Official Referee considered that the case was absolutely indistinguishable from *Kerby* v. *Harding* (1) adds greatly to the confidence which I feel in coming to the same conclusion.

The only other matter I think which I need mention is the case of the *Salisbury Supply Co.* v. *Pitkin* (2), which Mr. Eddy, the counsel for the defendants, happened to know, because he was counsel in that case also, and which was decided by the late Salter J. and myself. I was reminded, when the judgments in that case were read, that I was very doubtful indeed as to what my decision ought to be. That was a case in which a very small amount was at stake, and if I had formally dissented, inasmuch as it was an appeal from the county court and inasmuch as Salter J. thought that the county court judge was wrong, the effect would have been that the judgment would have stood, contrary to Salter J.'s clear opinion, and I thought on the whole I ought to agree with him. I think what I said was that my doubts were not sufficient to make it right to dissent formally. But in any case I am confident that the present point was not argued, and I am perfectly confident that the case of *Kerby* v. *Harding* (1) was never mentioned. Whether, if it had been, it could have been distinguished, I think is exceedingly doubtful, but I do not think it could be seriously suggested

(1) 6 Exch. 234. (2) Nov. 15, 16, 23, 1927. Unreported.

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that that decision, which dealt with a great variety of points, but not with this point, could possibly justify us in departing from the decision in *Kerby* v. *Harding*. (1)

In my opinion the learned Official Referee was perfectly right. I think I agree with every word of his judgment; I certainly do so with the whole of the substance of it, and the appeal must be dismissed with costs.

HUMPHREYS J. I concur, and I do so upon the ground stated in the judgment of the learned referee, where he says: "I confess, having considered the form of this notice and the form and the reasoning in the case of *Kerby* v. *Harding* (1), as expressed in Parke B.'s judgment, I cannot differentiate the notice in this case from the notice in that case." If the decision in *Kerby* v. *Harding* (1), which was a considered decision of the full Court, consisting of some of the most eminent judges who have graced the Bench of England, is to be reconsidered, it having been delivered in the year 1851, at least it cannot be by this Court to-day. I entirely agree with my Lord that we are bound to follow that case. Therefore the only question that I think we are at liberty to consider, in spite of the exceedingly able argument of Mr. Eddy, is: Is it possible to distinguish the notice given in this case from the terms of the notice which was decided to be a bad notice in *Kerby* v. *Harding*? (1) My view of the two cases, which are certainly the two most important cases which have been referred to here, quite shortly is this. In *Wakeman* v. *Lindsey* (2) it was assumed that the person who distrained intended to distrain upon all the goods that were upon the premises, and as between the landlord and the tenant the Court came to the conclusion, though with considerable hesitation, that the expression, "any other goods and effects that may be found in and about the said premises," was an indication that all the goods which in fact were upon the premises were then seized; and the Court held—and, I think, this is the only decision in that case—that if a notice states sufficiently clearly that the seizure is a seizure of all the goods upon the premises, it is not necessary to set out

(1) 6 Exch. 234. (2) 14 Q. B. 625.

the goods in detail in the form of an inventory or otherwise. Then came the case of *Kerby* v. *Harding* (1), and the distinction which was drawn by Parke B. in his judgment and taken by all the judges who agreed in that judgment, between the notice in that case and the notice in *Wakeman* v. *Lindsey* (2), consisted in the introduction of four words in the notice in the later case. Those four words are the words, "that may be required," so that the notice read as being a notice that there had been taken in distress "all other goods, chattels, and effects on the said premises"—so far it was clearly an intimation that the distress extended to all the goods, but it continued, "that may be required in order to satisfy the above rent." The decision of *Kerby* v. *Harding* (1) is a decision, as I read it, to the effect that because of those words the notice in that case was not a notice which made it sufficiently certain what goods were taken; to use the language of the judgment itself (3): "This notice leaves it uncertain what goods are taken; and therefore we think that it is not sufficient."

In the present case it has been pointed out by Mr. Eddy, and I was struck by his argument, that the four words in the notice in *Kerby* v. *Harding* (1) are not to be found. The material words of the present notice are, "all other goods upon the premises (unless specially exempt) sufficient to satisfy the amount of this distress and expenses." I have endeavoured to distinguish the words in this case from the words in the notice in *Kerby* v. *Harding* (1), but, like my Lord, I have found myself unable to do so. The words, of course, are different, but the language seems to me to be the same. I, therefore, agree with the learned Official Referee that it is impossible to distinguish *Kerby* v. *Harding* (1) from this case.

Appeal dismissed.

Solicitors for appellants: *Hicks, Arnold & Bender.*
Solicitors for respondent: *Warren & Warren.*

(1) 6 Exch. 234. (2) 14 Q. B. 625.
(3) 6 Exch. 241.

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May 7, 8.

LEITCH *v.* EMMOTT (Inspector of Taxes).

Revenue—Income Tax—Interest on War Loan—Husband and Wife—Profits of Wife deemed the Husband's Profits and assessed and charged in his Name —Death of Husband—Wife's Liability to Income Tax in First Year after his Death—Computation of Tax on preceding Year's Income—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Case III., rr.* 1 (*c*) *and* 2; *All Schedules Rules, r.* 16.

The Income Tax Act, 1918, Sch. D, Rules applicable to Case III., r. 2, provides (1): "The tax shall be computed in each case on the full amount arising within the year ending . . . . on the fifth day of April preceding the year of assessment. . . . ." All Schedules Rules, r. 16, provides: "A married woman . . . . entitled to any property or profits to her separate use, shall be assessable and chargeable to tax as if she were sole and unmarried. Provided that—(1.) The profits of a married woman living with her husband shall be deemed the profits of the husband, and shall be assessed and charged in his name, and not in her name or the name of her trustee; . . . ." :—

Held (reversing the decision of Rowlatt J.), that in the first year after her husband's death a widow in receipt of income from War Stock not taxed at source was liable to income tax under Case III. of Sch. D computed on her income from the same source in the preceding year, notwithstanding that by proviso 1 to r. 16 of the All Schedules Rules that income was to be "deemed the profits of her husband." This proviso operated only to convert the wife's income into the husband's income for the purpose of collecting tax.

Walker v. *Howard* (1927) 138 L. T. 367; 13 Tax Cas. 313 disapproved.

Case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

Mrs. Mary W. Leitch owned in her own right certain 5 per cent. War Loan Inscribed Stock, 1929/47, and 4 per cent. Victory Bonds (Post Office issue) and some bank interest, and for the year ending April 5, 1921, received the income of 2102*l.* 10*s.* and for the year ending April 5, 1922, 2115*l.* 10*s.* Mrs. Leitch's husband died on April 10, 1921, and up to this date assessments in respect of her income had been made upon her husband under r. 16 of the All Schedules Rules to the Income Tax Act, 1918. For the year ending April 5, 1922, Mrs. Leitch was assessed to income

(1) A new rule (which did not apply to this case) was substituted for r. 2 by the Finance Act, 1922, s. 17. The new rule provides for tax being computed as respects the first year in which the profits arise "on the full amount of the profits or income arising within that year."

tax on the preceding year's income under r. 2 of the Rules applicable to Case III. of Sch. D, and she appealed against the assessment.

She contended that she had no income while her husband was living and therefore that no liability to income tax existed for the year ending April 5, 1922. Against this, it was contended that for the purpose of assessment Mrs. Leitch's income was deemed to be her husband's income only during his lifetime and that she was assessable for the year ending April 5, 1922, on the full amount of the profits or income arising in the preceding year.

The Commissioners held, following *Walker* v. *Howard* (1), that Mrs. Leitch's income was before the death of her husband his income, and therefore that she was not liable for the year ending April 5, 1922, to tax under Case III. of Sch. D. But they held that in view of the opinion expressed by Scrutton L.J. in *National Provident Institution* v. *Brown* (2) she was liable to tax under Case VI. in respect of the income arising to her for the year ending April 5, 1922.

On appeal Rowlatt J. held, following his own earlier decision in *Walker* v. *Howard* (1), that Mrs. Leitch was not assessable to any income tax for the year ending April 5, 1922, under Case III. of Sch. D. As regards the contention that she could be taxed under Case VI., the Commissioners so decided on the strength of a dictum of Scrutton L.J. in *National Provident Institution* v. *Brown* (2), where he said that he was inclined to think that the company in that case could be assessed in respect of the first year of their holdings under Case VI. None of the other judges in the Court of Appeal or in the House of Lords (3) would express an opinion upon that point. They all thought that they could not except Lord Cave, who in a dissenting judgment said that Case VI. did not apply. The point did not arise in that case; but only arose in connection with an argument ab inconvenienti. He (his Lordship) did not feel himself bound by Scrutton L.J.'s dictum, and could not bring himself

(1) 138 L. T. 367; 13 Tax Cas. 313. (2) [1920] 3 K. B. 35.
(3) [1921] 2 A. C. 222.

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to see that it was right. Case VI. applied to tax "in respect of any annual profits or gains not falling under any of the foregoing Cases and not charged by virtue of any other Schedule." The source of income in this case was expressly stated to fall under Case III. In these circumstances, how could it possibly be said that this was a tax in respect of an annual profit or gain not falling under any of the foregoing Cases? In his judgment it was a fallacy to say that it did not come under Case III., because the result was nil. He therefore allowed the appeal.

The Surveyor of Taxes appealed, but on the appeal it was not contended that Case VI. applied.

Sir T. Inskip A.-G. and *R. P. Hills* for the appellant. The interest on the stock belonging to the widow became taxable under Sch. D, Case III., r. 1 (*c*), of the Income Tax Act, 1918, and r. 2 provided that the tax should be computed on the income arising from this source in the preceding year. Rowlatt J., in holding that the widow had no income from this source in the preceding year and was therefore not liable to tax, followed the reasoning of his previous decision in *Walker* v. *Howard* (1), when he held that a husband was taxable for War Loan interest because, although he had had none of his own in the preceding year, his wife held a small amount which by the All Schedules Rules, r. 16, proviso 1, was deemed to be his income.

[LORD HANWORTH M.R. referred to *National Provident Institution* v. *Brown*. (2)]

That was the converse case, when it was held that if no income arises from the particular source in the year of assessment, no tax can be claimed in respect of the income from that source in the preceding year. It shows that what is being taxed is the income in the year of assessment, although the tax is computed by reference to the preceding year's income.

It is submitted that the respondent was taxable for the year ending April 5, 1922, on the preceding year's income from the same source. Rule 16 of the All Schedules Rules

(1) 138 L. T. 367; 13 Tax Cas. 313. (2) [1920] 3 K. B. 35; [1921] 2 A. C. 222.

provides that a married woman entitled to profits to her separate use "shall be assessable and chargeable to tax as if she were sole and unmarried." The proviso that "the profits of a married woman living with her husband shall be deemed the profits of the husband and shall be assessed and charged in his name, and not in her name or the name of her trustee" does not make the income that of the husband for all purposes; and after the husband is dead the profits are the wife's income, although for purposes of assessment in the preceding year they are deemed the profits of the husband. Proviso 1 has no application after the husband is dead. *Singer* v. *Williams* (1) shows that income not itself liable to tax in an earlier year can be taken into account in computing the assessable income in a subsequent year. By analogy the wife's income for the year 1920 to 1921 can be taken into account in computing the assessable income for the following year, although for the purpose of assessment in the year ending April 5, 1921, the income is treated as the husband's income. This contention receives support from the provisions enabling a husband and wife to be separately assessed: All Schedules Rules, r. 17. If this right had been exercised, it would have been almost impossible to suggest that the wife had no income in the year ending April 5, 1921.

The difficulty created by Case III., r. 2, will not arise in the future, for by the Finance Act, 1922, s. 17, a new r. 2 was substituted which provides for the computation of tax as respects the year in which the profits first arise on the full amount of the profits of that year.

Needham K.C. and *W. Allen* for the respondent. The effect of r. 16, proviso 1, is to cause the wife's income to be deemed to be the husband's income for income tax purposes. When once that has been done for any purpose connected with income tax, it must be treated as his income for all income tax purposes: *Bradbury* v. *English Sewing Cotton Co., Ld.* (2) The Court has not got to consider whether the same source of income existed in the year preceding the year of assessment but whether it produced any income:

(1) [1921] 1 A. C. 41, 52. (2) [1923] A. C. 744; 8 Tax Cas. 491, 509.

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Whelan v. *Henning*. (1) And here it is necessary to go one step further and ask whether it produced any income that was income of the widow. It is not correct to say that r. 16 only made a wife's income the income of the husband for purpose of collection. Rule 16, proviso 1, provides that the income "shall be deemed the profits of the husband." It is under this proviso that a wife's income is treated as part of the husband's income for super tax purposes. It is substantive law, although stated in the form of a proviso. It directly negatives the words in the earlier part of the rule and makes them only applicable when the wife and husband are living apart. It is not a proviso in any true sense. Rule 16 originally appeared as s. 45 of the Income Tax Act, 1842, and its construction cannot be affected by the provision allowing husband and wife to make separate returns which was first permitted by the Finance Act, 1914, s. 9.

It is contrary to the whole scheme of the Income Tax Acts not to treat the incomes of A. and B. as perfectly distinct. Here the income for the year ending April 5, 1921, has been fixed once for all with the character of the husband's income.

[SANKEY L.J. According to your argument this statute makes what in the Common Law is called an election—namely, an election to treat the income in question as the husband's income, but is it not an election for the purposes of collection only?]

The proviso has a far deeper effect than that. It affects the liability to income tax and super tax: *In re Ward*. (2) Thus it was held in one of a group of cases reported together under the title *Inland Revenue Commissioners* v. *Brooke* (3) that for purposes of super tax the total income of a woman whose husband died during the preceding year "includes her income for the part of the previous year subsequent to, but not for the part prior to her husband's death."

No reply was called for.

LORD HANWORTH M.R. This case raises an interesting point under the Income Tax Acts. It is a case in which the

(1) [1925] 1 K. B. 387. (2) [1922] 1 Ch. 517, 520.
(3) [1923] 2 K. B. 814.

decision probably matters little to the Revenue authorities, because in the long run they will get their revenue whichever way it is determined; but the decision of the Court below has been found to create some difficulty in particular cases and to be unsatisfactory to particular individuals, and the Attorney-General has therefore thought it right to bring it before this Court on the terms that he pays the respondent's taxed costs of the appeal.

Rowlatt J., before whom the case came, followed *Walker* v. *Howard* (1) and did not really give an independent judgment. *Walker* v. *Howard* (1) was not taken to the Court of Appeal, but as the decision has proved unsatisfactory in certain cases it has been thought right to appeal in the present case in order to test the validity of the course adopted by Rowlatt J. in both cases.

The question arises upon quite simple facts. Mrs. Mary Leitch, who was the appellant before the Commissioners, owned in her own right some War Loan Inscribed Stock and Victory Bonds and also had bank interest in the year ending April 5, 1922. In respect of these holdings she was liable to be assessed to income tax under Sch. D, Case III., of the Income Tax Act, 1918. Turning to the actual words of that Schedule, she has to be assessed for the year ending April 5, 1922, in respect of "the annual profits or gains arising or accruing—(i) to any person residing in the United Kingdom from any kind of property whatever"; and the tax under this Schedule is to be charged under certain Cases, of which the appropriate one here is "Case III.—Tax in respect of profits of an uncertain value and of other income described in the rules applicable to this Case." The mode of computing tax in cases which fall to be determined under r. 2 of the Rules applicable to Case III. is stated as follows: "The tax shall be computed in each case on the full amount arising within the year ending on that day of the year preceding the year of assessment on which the accounts are usually made up, or on the fifth day of April preceding the year of assessment, and shall be paid on the actual amount as

(1) 138 L. T. 367; 13 Tax Cas. 313.

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aforesaid without any deduction." With regard therefore to the assessment to be made upon Mrs. Leitch in respect of her holding during the year 1922, it is necessary for the computation of the duty to estimate what was the full amount of the profits or gains arising therefrom within the preceding year. During that year which ended on April 5, 1921, she had securities of the same nature falling within Case III., the total profits of which was 2102*l.* 10*s.* The tax, therefore, which she is to pay in respect of her profits received from this class of investment in the year ending April 5, 1922, would not be assessed on the amount of the profits received in that year—namely, 2115*l.* 10*s.*, but on the full amount of the profits arising in the preceding year—namely, 2102*l.* 10*s.*

But Mrs. Leitch was in the year ending April 5, 1921, and down to April 10, 1921, a married woman, and it is said that there were no profits or gains in that year, which can form the measure of an assessment in the following year, because the profits or gains of a married woman are to be deemed to be the income of her husband, so that in that year Mrs. Leitch did not in fact enjoy any profits at all. Thus it is said on her behalf that as the measure of her liability to tax is the profits in the preceding year, 1920 to 1921, and in the circumstances of her status in that year no profits or gains arose to her, her liability to tax in the year 1921 to 1922 must be nought. Rowlatt J., following his decision in *Walker* v. *Howard* (1), acceded to that view, and we have to determine whether he was right.

It has been for a long period of time, certainly from the date of the Income Tax Act, 1842, provided that the income of a married woman living with her husband shall be deemed to be the profits of the husband. Sect. 45 of that Act provided "that any married woman acting as a sole trader by the custom of any city or place, or otherwise, or having or being entitled to any property or profits to her sole or separate use, shall be chargeable to such and the like duties, and in like manner, except as hereinafter is mentioned, as if she were actually sole and unmarried: Provided always,

(1) 138 L. T. 367; 13 Tax Cas. 313.

that the profits of any married woman living with her husband shall be deemed the profits of the husband, and the same shall be charged in the name of the husband, and not in her name, or of her trustee." I do not pause to inquire whether any similar provision existed in the predecessor of the Act of 1842. In the Income Tax Act, 1918, which is the Consolidation Act, that section appears as r. 16 of the General Rules applicable to all Schedules. Rule 16 is as follows: "A married woman acting as a sole trader, or being entitled to any property or profits to her separate use, shall be assessable and chargeable to tax as if she were sole and unmarried." Having regard to the nature of the rules imbedded in the Income Tax Act, it is, to my mind, clear that this rule provides for the charge being imposed upon a married woman in respect of her property and profits. There is a proviso, however, similar to that contained in s. 45 of the Act of 1842: "Provided that—(1.) the profits of a married woman living with her husband shall be deemed the profits of the husband, and shall be assessed and charged in his name, and not in her name or the name of her trustee."

Some criticism has been directed, not unfairly, by Mr. Needham to the form of that rule. He contends that the proviso in effect negatives the terms of the opening words of the rule. I do not think it right to accept that. Mr. Needham contends in effect that the first lines of the rule and the words "provided that" might be wiped out and the rule read as if it commenced: "The profits of a married woman living with her husband shall be deemed the profits of the husband, and shall be assessed and charged in his name," as if the charge was upon the husband in respect of the profits which belonged to his wife. It appears to me that the rule is intended to convey the same meaning as in s. 45 of the Act of 1842 and definitely to impose a charge upon the married woman in respect of her profits, although collection is to be made from the husband and the profits of the wife are in that sense and for that purpose to be deemed the profits of the husband.

By the Finance Act, 1914, s. 9, a scheme was provided making it possible for a husband to avoid being responsible

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for the tax on the profits of his wife. That section was passed in order to get rid of the inconvenience caused to husbands when they found it difficult to obtain from their wives the information required to fulfil s. 45 of the Act of 1842—now r. 16 of the All Schedules Rules to the Income Tax Act, 1918. Under this section a notice could be given by the husband requiring separate assessments on his income and that of his wife; but for all practical purposes the actual charge upon them remained as it would be, if the tax were all collected from the husband. The liability to tax and the amount of tax continued to be measured by the totality of their incomes, and they were unable to claim that a lower effective rate of tax should be imposed upon them because the income of each one separately came below a certain level. The system still remains that there must be the aggregation of their two incomes in order to see whether or not their total income is subject to tax and what is the effective rate at which it should be charged.

I turn to consider the point made on behalf of Mrs. Leitch that she is entitled to be treated as having received no profits in the year 1920 to 1921 because of the provision by which the profits for that year have for the purpose of collection been deemed the profits of her husband. We must, I think, take r. 16 as we find it and treat the proviso as a proviso. Rule 16 provides that a married woman shall be assessable and chargeable to tax. Bearing this in mind, the proviso will operate as a proviso and no more by allowing the husband to be the source through which collection shall be made. For that purpose and in that sense the profits which are not his are to be deemed to be his and in no other sense.

Mr. Needham has called our attention to *Bradbury* v. *English Sewing Cotton Co., Ld.* (1), but that case does not in my view assist or avail him. He cited the words of Lord Shaw (2): "Accordingly when the profits from a trading concern are taxed on the footing that it is an English trading concern then, ex necessitate, this involves that the taxing authority is committed to that situation and is, for all purposes of the

(1) [1923] A. C. 744. (2) [1923] A. C. 756.

Income Tax Acts, precluded from placing or reckoning the income so treated under any other category." That may be so upon such facts as arose in that particular case, but what we have really got to consider here is, not what was the mode of collection of the tax while Mrs. Leitch remained a married woman, but whether she can bring herself within the proviso to r. 16 so as to make a claim that the immunity of a married woman be given to her. The proviso begins: "The profits of a married woman living with her husband." From April 10, 1921, Mrs. Leitch was not a married woman living with her husband; she became a widow on that day. She is being taxed in respect of profits that she received in the year ending April 5, 1922, a year during which she was a widow. There is to my mind little difficulty in estimating the tax to be paid in that year, although in different circumstances and for different purposes, the purposes of collection while she was a married woman, it was the purse of the husband from which the Crown extracted payment of the tax imposed upon the joint incomes of the husband and wife. It is plain that we must look at the words of the proviso and cannot apply it if the circumstances in which it is applicable do not exist. I do not feel able to give the plain words of the proviso some special construction because of difficulties that may arise in certain circumstances. It does not appear to me to be a just method of construction to twist words from their plain meaning because in certain circumstances there may be hard cases or difficulties, either for the Crown or for the subject, in computing the liability of the latter to the former.

For these reasons I think that Mrs. Leitch cannot escape liability upon the words used in r. 16. The liability arises in respect of profits received in the year ending April 5, 1922, and those profits can be measured by the profits in the preceding year, although if the husband had survived, there would have been a different method of both assessment and collection in respect of the profits of 1922. There still remains a standard by which the tax can be measured, even though during the married life the profits of the two spouses were deemed to be the profits of the husband.

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For these reasons the appeal must be allowed. I say nothing about costs in view of the arrangement made by the Attorney-General.

LAWRENCE L.J. I agree. The case is one which deals with income tax falling under Case III. of Sch. D. Under r. 1 applicable to that Case, the tax extends to the interest on the investments which belong to Mrs. Leitch for her separate use. Under r. 2 the tax is assessed on the full amount of that interest arising in the year preceding the year of assessment and has to be paid on that amount without any deduction. Now, throughout the year preceding the year of assessment Mrs. Leitch was a married woman living with her husband, and under r. 16 of the All Schedules Rules, although the interest on the investments in question was assessable and chargeable to tax as if she were sole and unmarried it was to be deemed the profits of the husband, and to be assessed and charged in his name and not in her name. Early in the year of assessment the husband died, and it is now contended that the effect of proviso 1 to r. 16 is that the interest on these investments became for all purposes the income of the husband and consequently that Mrs. Leitch must be treated as not having received any interest on her investments in the year preceding the year of assessment, with the result that her income for the year of assessment ought to be assessed at nothing.

In my opinion that contention is not well founded. Rule 16 provides, in the first instance, that a married woman entitled to any property to her separate use shall be assessable and chargeable to tax as if she were sole and unmarried. Then, turning back to r. 2 of the Rules applicable to Case III., we find that the measure of that charge to tax is the amount of the income from her investments arising in the year preceding the year of assessment. It is clear to my mind, therefore, that the married woman is charged to tax in respect of her income for the year of assessment, to be measured by the income from the same investments received by her in the preceding year, thus showing that the income for the purpose

of the charge and of the measure of the tax is treated as her income. The proviso does not alter the character of the income charged to tax or the measure of the tax, but merely provides, with the object of facilitating the collection of the tax, that the assessment and charge shall be made in the name of the husband and that for that purpose the wife's income shall be treated as the income of the husband. This provision does not, in my judgment, operate to convert the income of the wife into income of the husband further than is necessary for the purpose of collecting the tax; with the result that it affords no valid ground for the contention that there was no income arising from the wife's investments in the year preceding the year of assessment within the meaning of r. 2 of Case III.

For these reasons, I agree that the appeal ought to be allowed.

SANKEY L.J. I agree and would not add anything, were we not differing from the learned judge in the Court below and had we not had the advantage, if I may be allowed to say so, of a very attractive argument in support of the judgment.

Mr. Needham's strong point is that the income for the year ending April 5, 1921, has been stamped for all purposes as the husband's income, that there has been a sort of statutory election, like an election at Common Law, upon which the Commissioners cannot go back, and that they cannot now be heard to say that the income was the wife's income, because it has already been deemed to be the income of the husband. Certainly Mr. Needham has in his favour a dictum, which appeared at first sight to be a strong dictum. It is the words of Lord Shaw in *Bradbury* v. *English Sewing Cotton Co., Ld.* (1): "Accordingly when the profits from a trading concern are taxed on the footing that it is an English trading concern then, ex necessitate, this involves that the taxing authority is committed to that situation and is, for all purposes of the Income Tax Acts, precluded from placing or reckoning

(1) [1923] A. C. 744, 756.

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the income so treated under any other category." I think those words must be taken to refer to the particular circumstances which fell for determination in that case.

Here we are in rather a different area. The word " deemed " introduces an artificial definition which, in my view, is only intended to be applied as long as the conditions exist to which it is intended to apply. There is some authority for that in the judgment of James L.J. in *Ex parte Walton* (1): " When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to." Founding myself upon those words, I turn to the proviso to r. 16, and it is to be observed that in the proviso what is being dealt with are " the profits of a married woman living with her husband." It starts with that assumption and then says that in that case—namely, when the profits are the profits of a married woman living with her husband, they shall be deemed to be the profits of the husband and shall be assessed and charged in his name; but they still remain the profits of the married woman living with her husband, because that is the subject with which the proviso is dealing. It appears to me that they are none the less her profits in one sense, although for the purposes, as it seems to me, of collection, they shall be deemed to be the profits of the husband and shall be assessed and charged in his name. I think that the assessment and charging in his name obviously only refers to a case when the husband is still alive and his wife living with him; but if those conditions do not exist, if the conditions upon which the artificial " deeming " depend no longer exist, then I think the profits are the profits belonging to the married woman. I cannot see, therefore, how they can be excluded as the source for taxation purposes. In other words, I think that the statutory election, if I may call it so, only applies for the purpose of collection, and when the conditions no longer exist the profits are those of the married woman.

(1) (1881) 17 Ch. D. 746, 756.

For these reasons, I think that the appeal should be allowed.

Solicitors: *Solicitor of Inland Revenue; Jaques & Co., for Hall, Walker & Norton, Huddersfield.*

H. C. G.

GRINHAM AND ANOTHER *v.* DAVIES.

1928 *April* 25.

Practice—Evidence—Personal Injuries—Defendant insured—Disclosure to Jury—Discharge of Jury—Discretion of Judge.

Where in an action for damages for personal injuries the fact that the defendant is insured is disclosed to the jury, the judge, in his discretion, may discharge the jury and order another trial.

APPEAL from Shoreditch County Court.

The plaintiffs brought this action against the defendant claiming damages for personal injuries sustained in a street accident. In opening the case to the jury counsel for the plaintiffs read a letter from which the county court judge considered that the jury could draw the inference that the defendant was insured in respect of the payment of damages, which in fact he was. The county court judge accordingly discharged the jury and ordered that the case be tried by a fresh jury.

The plaintiffs appealed.

Moyses for the appellants.

Serjeant Sullivan K.C. and *Leverson* for the respondent.

SALTER J. This is an appeal from the Shoreditch County Court which raises a question of some practical importance in these days, when the courts are so much occupied with claims for damages for personal injuries in connection with driving; indeed, it may be said that such claims form the staple litigation of to-day. The present case is one of this kind and arises out of a street accident. The defendant was in fact insured, and in the course of opening the case counsel for the plaintiffs was understood by the county court

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judge to convey that information to the jury. In consequence he discharged the jury and ordered the case to be tried by another jury. From that order the plaintiffs appeal, and the questions are, firstly, whether the information was in fact conveyed to the jury, and, if it was, whether this Court ought to set aside the order of the county court judge.

It is convenient to consider the latter question first. It is, in my opinion, a settled rule of practice in cases of this kind, that the jury shall not be informed by or on behalf of the plaintiff that the defendant is insured. The rule is, of course, not universal, but it is well established in cases of this kind, and is obviously fair, inasmuch as one knows that in such cases the jury are, naturally enough, much more prone to find for the plaintiff if they know that the amount of their award will be paid by an insurance company and not by a private person. It is often difficult for counsel for the plaintiff to avoid letting the jury know this fact; and if he does so the circumstances will no doubt be considered by the judge in deciding what course he should adopt. But there is no doubt whatever of the existence of the rule, and it is an important one. If the rule is violated, it is no doubt a matter of discretion for the judge what course he will take. The result of the violation of the rule is that the jury, unintentionally it may be, but in fact none the less, are prejudiced, and the judge must take such course as he thinks proper. There can be no doubt at all that the judge has a discretion to order the jury to be discharged, if he thinks that the circumstances of the case render that course the proper one. He has that power, not only by virtue of the rules of practice, but also by virtue of the much wider rule that it is the duty of a judge to see fair play between the parties and to prevent any unfair appeal to the prejudices of the jury.

There are four authorities to which reference ought to be made. The first is *Wright* v. *Hearson*. (1) That was a case in which the defendant, who was being sued for damages for personal injuries caused by his motor-car, was asked in cross-examination: "Are you insured?" The defendant did not

(1) [1916] W. N. 216.

answer the question. The jury having found a verdict for the plaintiff, the defendant appealed. Avory J. said (1): "It is admitted that the counsel who represented the plaintiff in the county court asked the defendant in cross-examination if he was insured. I wish to say emphatically that that was a most improper and most irregular question to put. It appears however that the question was not answered. The judge seems to have said that it had nothing to do with the case, and to have added that every prudent and sensible man was insured. But although the putting of the question might create prejudice in the minds of the jury, yet, having regard to the fact that it was not answered, and that, as we must assume, the county court judge said something to remove, as far as he could, its effect upon the minds of the jury, I do not think we can say that the jury was in fact prejudiced." Rowlatt J., after stating the facts, said: "That was an irregular question to put, and its effect was not removed by the fact that it was not answered. It was irregular and was calculated to prejudice the defendant with the jury. It should be stated emphatically that counsel are not entitled to do such a thing in order to prejudice the minds of the jury. It is the duty of counsel to know and observe the rules governing what they may and what they may not do in the conduct of cases; they may not disregard those rules and trust to not being checked in time. In proportion as counsel voluntarily observe those rules so will their standing and reputation grow. When this question was put to the defendant the judge might justifiably have discharged the jury and made the plaintiff pay the costs. The judge did not take that course in this case, but those who make suggestions such as that now complained of must face the possibility of such an order being made."

The next case is *Askew* v. *Grimmer*. (2) In that case the fact that the defendant was insured had been disclosed, and Branson J. said that "he thought that it was the practice not to tell juries that an insurance company was involved, and that it was, perhaps, an error of judgment to have done

(1) [1916] W. N. 216. (2) (1927) 43 Times L. R. 354.

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so now. But, in view of the discussion, he felt sure that the jury would realize that it would be most unfair to the defendant to treat him as being insured, because if he had said what was alleged it might turn out that he was not insured at all. The most convenient course would be that the trial should proceed, and if he (his Lordship) were wrong, the Court of Appeal could then correct the matter."

The third case is *Ellis* v. *M. Mayhew, Ld.* (1) The associate's note is as follows: "In the course of the opening counsel for the plaintiff read the correspondence. In one letter read to the Court and jury the word 'assured' occurred. The Lord Chief Justice pointed out that this should not be read, as the jury would now infer that the parties were insured. Counsel for the defendants then made application to withdraw the case from the jury sworn and to allow the case to go before another jury. In the absence of authority, this application was refused by the Lord Chief Justice, who made the suggestion that the jury might be discharged from the case, and that he might try the case alone. Both counsel consented to this course, and the jury were discharged from the case and paid their fees, and the case proceeded as a 'non-jury by consent.'"

Lastly, there is the case of *Gowar* v. *Hales.* (2) There the question was whether the insurance company which had issued a motorist's insurance policy should be brought in as a third party at the hearing of an action for damages by the injured party against the motorist, and the Court of Appeal was of opinion that no such order should be made. The appellant had relied on the three cases to which I have referred, and it was held that, as the fact of the insurance ought not to be made known to the jury, it must be wrong to join the insurance company as a third party. Scrutton L.J. there says (3): "But if it was not a question of an action against a motorist but a question whether an insurance company should pay a person who was damaged by a motor,

(1) Unreported. Tried before Lord Hewart C.J. and a special jury on March 24 and 25, 1926.
(2) [1928] 1 K. B. 191.
(3) [1928] 1 K. B. 197.

it was found extremely difficult to get fair hearings from juries, with the result that it has been established as a rule of practice at the Bar which the judges enforce, that in an action against a motorist, the jury ought not to be told that the defendant is insured. Whether the way of enforcing it is, as has been done in one case cited to us [*Ellis* v. *Mayhew, Ld.* (1)], to discharge the jury when the fact has been told them, or whether it is, as in the case before Branson J. [*Askew* v. *Grimmer* (2)], to say it is an error of judgment on the part of the counsel who has mentioned it but that the judge should endeavour to put it right by his summing up it is not necessary to decide here. There was this undoubted rule of practice on which the judges acted; and to have a rule of practice that a jury should not be informed that the defendant is insured, and for the judge at the same time to bring in the insurance company to take part in the trial of the action as the judge shall direct and be bound by the result of the trial, seems to me to be entirely inconsistent." The result is that, so far as we are aware, there is no case in which a judge has taken the course which the county court judge has taken here, but, speaking for myself, I have no doubt that it was within his discretion to take that course, and that discretion is not subject to appeal.

That still leaves for consideration the question whether in this case anything was said to the jury which would lead them to know that the defendant was insured. [His Lordship dealt with the county court judge's note and statements of counsel, and continued:] On the whole, we are clearly of opinion that, the onus being on the appellants, we cannot say that it has been satisfactorily shown that the report of the county court judge is mistaken in fact. We think that the jury, no doubt unintentionally, were informed that the defendant was insured.

For these reasons I think that this appeal fails.

TALBOT J. I am of the same opinion. It is no doubt an established rule of practice in cases of this kind that the

(1) Ante p. 252, note (1). (2) (1927) 43 Times L. R. 354.

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fact that a defendant is insured must not be disclosed to the jury. The rule is one which is generally observed by the Bar, and one which it is the duty of the courts to enforce. Whether it is an expedient rule appears to me to be a very doubtful matter. I doubt very much whether it works for justice. In the first place, no jury in these days can avoid knowing that in the very great majority of such cases the defendant is insured, and no one can say whether or not they give effect to their suspicion in any particular case. It is, in my opinion, better that the jury should have the advantage of the addresses of counsel on the point, and of the express direction of the Court that the matter is one to which they should pay no attention. Secondly, I think it causes injustice in quite a different direction. In cases of this kind the damages are more often inadequate than excessive, and quite frequently where a defendant does not appear to be very affluent, and where a heavy award of damages is justified on the facts, a jury do not award the proper sum which they would award if they knew that the defendant was insured. If the whole matter were disclosed it would be much better, because then the attention of the jury would be explicitly directed to the fact that in considering damages the one matter which they ought to take into account is what the injury to the plaintiff has been.

These considerations are, however, quite irrelevant to this case, because the rule does exist, and as long as it exists must be enforced. We have no right to inquire whether the county court judge acted judiciously in the circumstances. It is clear that one way of enforcing the rule is to discharge the jury at the expense of the party whose advocate has violated it. That is sufficiently established by authority, for example, by the judgment of Rowlatt J. in *Wright* v. *Hearson*. (1) Counsel for the appellants here admits that if he had read the letter as it stands and disclosed the existence of the insurance company, the county court judge would have been justified in discharging the jury. The whole question is whether the judge is correct in saying that what

(1) [1916] W. N. 216.

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was read by counsel had in fact the effect of disclosing to the jury what would have been disclosed if the letter had been read in its entirety, and whether what the judge tells us is accurate. I have no doubt that, if a portion of the letter was read as alleged, it would not fail to convey to the jury the information of which complaint is made. The matter is one on which it is impossible for us to say that the county court judge formed a wrong opinion, and, if what he says is correct, he had obviously the same power to discharge the jury as if the letter had been read in extenso. In the circumstances it is impossible for us to interfere, and I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellants: *Berry Tompkins & Co.*
Solicitors for respondent: *White & Co.*

W. L. L. B.

K. B. D.
1929
Feb. 1.
C. A.
April 26.

MIDLAND MOTOR SHOWROOMS, LIMITED *v.* NEWMAN.

[1928. M. 3649.]

Principal and Surety—Hire-purchase Agreement—Payment of Instalments—Giving Time to Principal as to Some—Discharge of Surety as to Whole.

The plaintiffs were the assignees of the rights of the R. Company under a hire-purchase agreement dated July 6, 1927, whereby the company ("the owners") agreed to let to one Toye ("the principal") a motor car on the terms that he should be at liberty to purchase the car at a fixed price, paying as a first payment 22*l.* 6*s.* 8*d.*, and thereafter monthly payments of 14*l.* 3*s.* 4*d.* until the whole was paid. The payments by the principal under this agreement were guaranteed by the defendant as surety under a document signed by her on July 6, 1927. The principal afterwards fell in arrears in payment of the monthly instalments, and on February 3, 1928, he wrote to the owners offering a cheque for 20*l.* drawn by a friend in part payment. On February 4 the owners wrote accepting this cheque and stipulating that the rest of the arrears should be paid within one month. The cheque was sent to the owners, but the arrears, which amounted to 79*l.*, were not paid within one month, and the owners then took back the car, acting upon their powers under the hire-purchase agreement. On September 18, 1928, the owners assigned their rights under that agreement to the plaintiffs, who claimed 122*l.* in all from the defendant as surety:—

Held, by the Court of Appeal (affirming the decision of Avory J.), that there was a binding contract by the owners to give time to the principal debtor.

Held, also, that the liability for payments under the hire-purchase agreement was one and indivisible, and that the defendant was entirely discharged from her suretyship.

Croydon Commercial Gas Co. v. *Dickinson* (1876) 2 C. P. D. 46 distinguished.

ACTION tried by Avory J. as a short cause.

The following statement of facts is substantially taken from the judgment of Avory J.:—

The Midland Motor Showrooms, Ld., claim as the assignees of the rights of the Regent Construction and Finance Company, Ld., under an agreement made on July 6, 1927, whereby that company agreed to let to one Bernard Toye a motor car on the terms that he might be at liberty to purchase the motor car at a certain price, in the meantime paying as a first payment 22*l.* 6*s.* 8*d.*, and thereafter monthly

payments of 14*l.* 3*s.* 4*d.* The performance of these obligations by Bernard Toye was guaranteed by a document dated July 6, 1927, signed by the defendant, Mrs. Newman, who thereby guaranteed the due observance and performance of the hiring on the conditions in the agreement, and the payment of the monthly hire rent and other moneys made payable thereby.

Payment of the monthly instalments fell into arrear, and on February 3, 1928, Toye wrote to the Regent Construction and Finance Company offering a cheque for 20*l.* drawn by a friend in part payment. The company replied accepting this offer, but stipulated that the remaining arrears of instalments should be paid by Toye within one month. The cheque was duly sent to the company and payment received thereon, but the rest of the arrears, 79*l.*, was not paid within the month, and the company then took back the car in virtue of their powers under the hire-purchase agreement. On September 18, 1928, the company assigned their rights under the agreement to the plaintiffs, who then brought this action against the defendant as surety.

Gallop for the plaintiffs said that even if further time had been given in respect of the instalments due up to February 4, 1928, the defendant was not discharged as surety for subsequent instalments: *Croydon Commercial Gas Co.* v. *Dickinson.* (1)

O'Hagan for the defendant argued that the contract here was not separable, as in *Croydon Commercial Gas Co.'s* case. (1) The contract being indivisible, the surety was completely discharged owing to the giving of further time by the owners to the principal.

AVORY J. [after stating the facts as above, continued:] The question in this case is whether the Regent Construction and Finance Company did in fact give time to the principal debtor for payment of the monthly hire rent, and if they did, whether the surety, the present defendant, is in consequence thereof discharged. That they did give time to the principal

(1) 2 C. P. D. 46.

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debtor is a fact beyond dispute, as appears from the letters of February 3 and 4, 1927. From these two letters it appears that they did in fact give time for the payment of the balance of arrears. It is, however, said on behalf of the plaintiffs that there was no binding contract to give time, in other words, that there was no consideration for it, and, therefore, no contract. It is suggested that the only effect of the offer made by the debtor, Toye, was an offer that he would pay the sum of 20*l.*; I cannot accept that suggestion. It is clear from the letter of February 3, and the answer given by the Regent Construction and Finance Company on February 4, that what the company were accepting was an offer by the debtor, who stated that he was not in a position to pay 20*l.*, that he would have sent to them a cheque for 20*l.* from a friend of his. The company agreed to accept the cheque for 20*l.* from his friend, and I think in those circumstances that, within the authorities, they were accepting a valuable and negotiable security in exchange and in payment of a larger sum of money which was then due, and that is clearly a good consideration.

The company did give time, the only question which remains is whether they have discharged the present defendant only from the payment of the amounts which were then due, or whether the giving of time operated to discharge her altogether from her obligations under this guarantee. Unless this case can be brought within the authority of *Croydon Commercial Gas Co.* v. *Dickinson* (1) it is clear, on general principles, that the contention that she was discharged only from the payment of the amounts then due cannot be maintained. In other words, unless I can say that this contract for the hire of this motor car consisted of a number of separate contracts under which the hirer was to pay each month a certain sum, *Croydon Commercial Gas Co.* v. *Dickinson* (1) has no application. That was a case where it is obvious from the arrangements between the parties that there was to be a separate contract each month under which Dickinson agreed to purchase not a specific amount of the tar, but

(1) 2 C. P. D. 46.

such amount as was estimated on the last day of each month; therefore until the expiration of each month no one could know what amount was to be supplied or to be paid for. It followed, therefore, in that case that there was a separate contract for each month. Kelly C.B. said (1): "It has been contended by Mr. Smith, that there was but one contract, and that therefore if time was given in respect of one performance under it, that operated as a discharge of the whole contract. But although in one sense it was one contract, yet, in effect, it was as much three several contracts as if it had been created by three separate instruments." Now, I read that as meaning that if there is one contract, and time is given in respect of one performance under it, that operates as a discharge of the whole contract. In my opinion this was one contract and cannot be separated into a number of contracts stipulating for payment every month. I think it follows that the defendant is altogether discharged and is entitled to judgment with costs.

Judgment for defendant.

F. P. F.

The plaintiffs appealed. The appeal was heard on April 26, 1929.

Gallop for the appellants. As part of my argument I adopt the following passage from Rowlatt on Principal and Surety, 2nd ed., p. 255: "Where a surety is liable for several distinct debts, duties or obligations, time given in respect of one of them, the position of the surety with regard to the remainder not being altered, will not discharge the surety as to the remainder." First, it is submitted that there was here no binding agreement to give time. The giving of a cheque does not operate differently from the giving of cash. The mere fact that a cheque passes is not in itself sufficient to constitute an agreement to give time. The sending of a cheque is not equivalent to an agreement to give a negotiable security. It is true that the cheque was to be given by a third party, but there was no stipulation that the

(1) 2 C. P. D. 49.

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third party should pay. All the appellants agreed to do was to take the 20*l.* They did not care where it came from.

Secondly, it is submitted that the decision in the *Croydon Commercial Gas Co.'s* case (1) applies, and that even if the surety is released in respect of the instalments which were in arrear she is not released from the further instalments.

[He also referred to *Harrison* v. *Seymour* (2); *Dowden & Co.* v. *Levis.* (3)]

[LAWRENCE L.J. referred to *Polak* v. *Everett.* (4)]

H. O. O'Hagan for the respondent was not called upon to argue.

LORD HANWORTH M.R. We have had an interesting argument by Mr. Gallop to assist the Court, which recognizes the value of the argument none the less because it fails. The point in the case is a short one but involves certain principles of law. The contract in question was made on July 6, 1927, whereby the predecessors of the plaintiffs made a hire-purchase agreement with Toye, with reference to a Renault car. At the same time a guarantee was given by Mrs. Newman, and now the plaintiffs, the successors of the Regent Construction and Finance Company, Ld., sue Mrs. Newman for sums in respect of payment of which Toye made default, the amount claimed being made up as to 79*l.* 13*s.* 4*d.* of arrears of instalments, as to 43*l.* for costs of repairs to the car. Mrs. Newman says she is not liable to pay the plaintiffs upon this guarantee on the ground that by reason of the principal debtor having been given time by the plaintiffs to pay instalments she has become released from her guarantee.

The nature of the contract guaranteed therefore has to be considered. The agreement set out undertakings given by the hirer and the owner. The hirer undertook to pay 22*l.* 6*s.* 8*d.* as a first payment on August 6, 1927, and thereafter every month 14*l.* 3*s.* 4*d.*, and if default was made in those payments to pay interest at the rate of 10 per cent. from the

(1) 2 C. P. D. 46.
(2) (1866) L. R. 1 C. P. 518.
(3) (1884) 14 L. R. Ir. 307.
(4) (1876) 1 Q. B. D. 669.

due date until payment, but that provision was to be without prejudice to the strict rights of the owner under any other clause of the agreement. The hirer undertook to take proper care and keep in repair the motor car, to insure it, to permit the owner to have access to it, to pay the rent, rates and taxes of the premises upon which the car might be stored. The owners on their part agreed that the hirer should have the option of purchasing by paying them the agreed price mentioned in the schedule—namely, 277*l.* 6*s.* 5*d.* less any moneys previously paid by the hirer. Then the owners also agreed that if they retook possession under the terms of the agreement the hirer should have the right to reinstate the agreement on paying arrears of rent up to the time of reinstatement. By clause 4 (*e*) of the agreement it was provided that no variation with regard to the payment of the rent should prejudice or affect any other provision thereof. All those provisions in the agreement were interlocked. They are mutual obligations, and that clause 4 (*e*) was intended to show that that was so. Default was made by Toye in the payment of three of the monthly instalments, November, December, 1927, and January, 1928, in all 42*l.* 10*s.* On January 7, 1928, the predecessors of the plaintiffs wrote to Toye stating that they could not extend grace in respect of the arrears and that failing payment of the arrears of instalments due they would take possession of the car. A letter was also sent to the surety. On February 3, 1928, Toye wrote to the company: "I regret not having written you before with reference to the overdue instalments, but have refrained from doing so because I was unable to suggest any clearing up of my difficulty. Now, however, I have met an old friend who, on hearing of my circumstances, offers to help me and is willing to send you a cheque for 20*l.* You know my circumstances too well and it is useless adding that with ordinary luck I shall be on my feet again very soon, so if you will kindly accept this on account I faithfully promise to find the balance of arrears within a month. . . . . I hope you will see your way clear to accept this, and I will at once arrange for my friend to let you have the cheque." That

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is a confession by Toye that he himself could not clear up the difficulty but had secured a friend who would help him. The reply to that letter was: "We are in receipt of your letter of yesterday's date and note your remarks. On further consideration of the circumstances I have been instructed to inform you that we are prepared to accept 20*l.* on account, the arrears to be paid within one month of to-day's date. Kindly have cheque forwarded by return of post and send acknowledgment of this letter of acceptance of your terms." That is an acceptance of the letter of February 3. If that was what happened it was an agreement by the motor owners that they would accept the arrears within one month, so that in fact there was to be a sum of 22*l.* 10*s.* left over to be paid on March 4 instead of on January 7, 1928, if the cheque was sent for 20*l.*

On December 19, 1928, a writ was issued by the plaintiffs against the defendant claiming 122*l.* 13*s.* 4*d.* The defendant contends that she was discharged from her guarantee by the agreement to accept the cheque for 20*l.* and to give time for payment of arrears. Avory J. decided that she was right. Was there a binding contract to give time? There was in my opinion a clear agreement that time should be given. Was there any consideration? In my opinion there was, and if any authority for that is required *Cumber* v. *Wane* (1), with the authorities appended in Smith's Leading Cases, supplies it. So we hold that there was consideration in the accepting of the intervention of a third party at a time when the capacity of Toye to pay was wholly spent. It is not for others than the surety to consider the nature of that intervention, and the Court will not entertain the question of the effect of it on the surety. The surety is the person solely to decide whether the intervention has adversely affected her position as surety.

What is the effect of the creditor giving the debtor time? The surety is thereby deprived of his right to have the securities of the creditor and enforce them in his name: see Bullen & Leake, Precedents of Pleadings, 2nd ed., p. 507. The

(1) (1718) 1 Sm. L. C., 12th ed., 376, 390; 1 Stra. 426.

surety in other words has the right to say, I can come in if default is made in payments by the debtor, and I am interested in the due payment of the debt.

In *Howell* v. *Jones* (1) Bolland B., quoting from Gibbs L.C.J. in *Orme* v. *Young* (2), said: "'What is forbearance and giving time? It is an engagement which ties the hands of the creditor. It is not negatively refraining; not exacting the money at the time'; (by which of course he means at the time when due by the contract between the principal and the creditor); 'but it is the act of the creditor depriving himself of the power of suing by something obligatory, which prevents the surety from coming into a Court of equity for relief, because the principal having tied his own hands, the surety cannot release them.'" That puts in the neatest way the fact that it is the surety who has a definite interest in seeing that the obligations of the debtor are fulfilled. These are the principles which we have to apply here. There was I think a binding agreement for good consideration to delay the enforcement of the creditors' rights, and, therefore, the rights of the surety were impinged upon, and it is not for us to determine whether the surety has been thereby injured.

As there was that binding agreement by the principal with the debtor the surety is discharged. But it is said that, following the judgment in *Croydon Commercial Gas Co.* v. *Dickinson* (3), the liability in respect of the repairs to the car and in respect of what had accrued due at the time of the agreement that time should be given in respect of the arrears may be severed from the remaining payments due under the hire-purchase agreement, and that there is no release in respect of those remaining payments which can be so severed. I have some difficulty in appreciating what Bramwell J.A. meant in his judgment (4), but those observations were merely dicta, and independently of them the *Croydon Commercial Gas Co.'s* case (3) is wholly different from the present case, as here the liability of Toye cannot be severed. I do not think therefore that the *Croydon*

(1) (1834) 1 Cr. M. & R. 97, 107.
(2) (1815) Holt, N. P. C. 84, 86.
(3) 2 C. P. D. 46.
(4) 2 C. P. D. 46, 50.

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Commercial Gas Co.'s case (1) is applicable, as there it was possible to find that there were separate contracts. The appeal must be dismissed with costs.

LAWRENCE L.J. This case is not free from difficulty. The question is whether the agreement to give time for the payment of the arrears of the instalments due under the hire-purchase agreement operated to discharge the surety not only from any liability in respect of those instalments but also from any further liability in respect of the whole contract. In other words, whether this case falls within *Croydon Commercial Gas Co.* v. *Dickinson* (1) or whether it comes within the decision of Sir John Leach in *Eyre* v. *Bartrop.* (2) The agreement here is an agreement which is one and indivisible—namely, for the hire of a motor car. The *Croydon Commercial Gas Co.'s* case (1) is distinguishable from the present case in that the contract there was for the sale and purchase of goods to be delivered and paid for monthly, and it was held that the giving of time for the payment for one month's supply only operated to discharge the surety in respect of the payment for that month's supply, and that as the contract was severable the giving of time did not operate to discharge the surety from liability in respect of the amounts due for the two following months' supply. In *Eyre* v. *Bartrop* (2) on the other hand it was held that the agreement was indivisible, and that as the arrangement made between the principal creditor and principal debtor had altered the position of the surety he was wholly discharged. I have come to the conclusion, though not without hesitation, that for the reasons stated by the Master of the Rolls the present case comes within the principle of *Eyre* v. *Bartrop* (2), and that the surety here is discharged from any further liability under her guarantee. The appeal, therefore, fails and will be dismissed.

SANKEY L.J. I agree and should like to begin my judgment by reading the following passage from the judgment

(1) 2 C. P. D. 46. (2) (1818) 3 Madd. 221.

of Cockburn C.J. in *Croydon Commercial Gas Co.* v. *Dickinson* (1), as reported in the Law Journal Reports (2): "I have entertained some slight doubt upon the subject, but I willingly stifle that doubt in deference to the decided opinions of other great authorities." It appears to me that the ratio decidendi proceeds on a different basis. If I had thought that case was at all like the present or that the dictum of Bramwell J.A. was material to the decision of that case it might be more difficult. The contract before us consists of interlocked and indivisible stipulations, but in the *Croydon Commercial Gas Co.'s* case (1) there were several separate contracts, and that is the distinction. I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellants: *Burton & Ramsden.*
Solicitors for respondent: *Silkin & Silkin.*

(1) 2 C. P. D. 46.
(2) 46 L. J. (C. P.) 157, 159. [In the Law Reports the last words are "my learned Brethren."]

W. I. C.

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SIMBRO TRADING COMPANY, LIMITED *v.* POSOGRAPH (PARENT) CORPORATION, LIMITED.

Appeal—Matter of "practice and procedure"—Arbitration—Application to revoke Submission—Arbitration Act, 1889 (52 *&* 53 *Vict. c.* 49), *s.* 1—*Supreme Court of Judicature (Consolidation) Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 31, *sub-s.* 3.

An appeal from a judge at chambers refusing leave to revoke a submission to arbitration is in a matter of practice and procedure, and therefore lies to the Court of Appeal and not to a Divisional Court.

In re Colman and Watson [1908] 1 K. B. 47 followed.

In re Frere and Staveley Taylor & Co. and North Shore Mill Co. [1905] 1 K. B. 366 not followed.

APPEAL from a decision of Finlay J. at chambers affirming the order of a master refusing an application by the defendants for an order to revoke a submission to arbitration.

The defendants appealed.

Lilley for the appellants.

Cave K.C. and *T. F. Davis* for the respondents. There is a preliminary objection to the hearing of this appeal. Order LIV., r. 23, provides that "in the King's Bench Division, except in matters of practice and procedure, the appeal from a decision of a judge at chambers shall be to a Divisional Court"; and the Judicature Act, 1925, s. 31, sub-s. 3, reproducing an earlier provision to the same effect, enacts that "in matters of practice and procedure every appeal from a judge shall be to the Court of Appeal." This matter is not one of practice and procedure, and therefore the appeal lies to the Divisional Court and not to the Court of Appeal. It is true that in *In re Portland Urban District Council and Tilley & Co.* (1) a Divisional Court held that an appeal from a judge at chambers granting leave to revoke a submission to arbitration lay to the Court of Appeal and not to the Divisional Court, but in *Miller, Gibb & Co.* v. *Smith & Tyrer* (2) Lush J. said that *In re Portland Urban District Council and Tilley & Co.* (1) must be taken to have been overruled, as it was not reconcilable with *In re Frere and*

(1) [1896] 2 Q. B. 98. (2) [1916] 1 K. B. 419.

Staveley Taylor & Co. and North Shore Mill Co. (1), where the Court of Appeal held that an appeal from a judge at chambers directing an arbitrator to state a case lay to the Divisional Court and not direct to the Court of Appeal, inasmuch as there was no question of practice and procedure in a cause or matter in the High Court: see also *Watson* v. *Petts* (2) and *Long* v. *Great Northern and City Ry. Co.* (3) It is true that in *In re Colman and Watson* (4), an application to enforce an award was held to be a matter of practice and procedure, and therefore that an appeal from the judge at chambers lay direct to the Court of Appeal on the ground, as stated by Vaughan Williams L.J., that as by s. 1 of the Arbitration Act, 1889, "a submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a judge, and shall have the same effect in all respects as if it had been made an order of Court," the case must be treated as if the submission had in fact been made an order of Court. The real purpose of s. 1 of the Arbitration Act, 1889, was to make submissions irrevocable, and that being so Vaughan Williams L.J. was mistaken in treating a submission as if it had in fact been made an order of Court. Moreover, the decision is not reconcilable with *In re Frere and Staveley Taylor & Co. and North Shore Mill Co.* (1), which, it is submitted, is correct.

Lilley for the appellants was not called upon, but he cited *Richardsons and Bradley & Co.* v. *Bernhard.* (5)

SCRUTTON L.J. In this case a preliminary point has quite rightly been taken in view of the state of the authorities. The fact that the point is taken shows, however, the unfortunate state of the procedure, which has received no correction from the Rule Committee.

The matter arises in this way: a contract between the manufacturers of certain apparatus and their buyers contains an arbitration clause, and an arbitrator was in fact appointed.

(1) [1905] 1 K. B. 366.
(2) [1899] 1 Q. B. 54.
(3) [1902] 1 K. B. 813.
(4) [1908] 1 K. B. 47.
(5) [1925] 2 K. B. 121.

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The buyers desired to revoke the submission to the particular arbitrator, but the master and judge refused the application. The buyers appeal, and the manufacturers contend that the buyers have come to the wrong Court.

By provisions in previous statutes now reproduced in the Judicature Act, 1925, appeals from a judge in chambers in matters of practice and procedure come to this Court; in other matters appeals go to the Divisional Court. Is an application to revoke a submission a matter of practice and procedure or not? The authorities, of which I have eight before me, are contradictory on the subject. I begin with *Watson* v. *Petts*. (1) In that case an application was made to the judge in chambers for a prohibition to restrain a county court judge from proceeding further in the matter on the ground that he had no jurisdiction to make a certain order which he had made. In his judgment A. L. Smith L.J. began by saying: "We" (himself and Collins L.J.) "have had an opportunity of consulting our brother Lords Justices (with the exception of Rigby L.J.) on the point raised." So the decision was really one by five Lords Justices. A. L. Smith L.J. then, after stating that the point raised was whether, when a summons was taken out in chambers for an order to prohibit a county court judge proceeding further in a matter before him, the appeal from chambers lay to the Queen's Bench Division or to the Court of Appeal, said: "This depends upon the question whether an application for a prohibition to restrain an inferior Court from exceeding its jurisdiction is a matter of practice or procedure within the meaning of s. 1, sub-s. 4, of the Supreme Court of Judicature (Procedure) Act, 1894. We are of opinion that it is not, and that the appeal therefore is to the Divisional Court, and not to this Court in the first instance. The practice and procedure mentioned in the section cover matters of practice and procedure in connection with a cause or matter in the High Court, and not a matter in which a county court judge is sought to be prohibited from exceeding his jurisdiction in his court. Here the county court judge is said to have done something in his

(1) [1899] 1 Q. B. 54.

court which he had no jurisdiction to do. Thereupon application has been made to a judge of the High Court, not in any cause or matter in the High Court, but in relation to something which the judge of the county court has done or proposed to do in his own court." That appears to lay down an intelligible rule subject to the question which arises in this case as to what proceedings are and what are not in the High Court. As I understand from what was said in that case, practice and procedure mean practice and procedure in the High Court, and when the appeal relates not to anything in the High Court but to something outside that Court it lies to the Divisional Court, but where it relates to practice and procedure in the High Court it lies to the Court of Appeal.

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The next case was *Long* v. *Great Northern and City Ry. Co.* (1) There the application in respect of which the appeal arose was to a judge in chambers for an order that the question arising on a case of compensation under the Lands Clauses Consolidation Act, 1845, should be tried in the High Court. The Court of Appeal, following its decision in *Watson* v. *Petts* (2), held that as the matter related to a proceeding which was not in the High Court, it was not a matter of practice and procedure, and therefore the appeal did not lie to the Court of Appeal.

Then came *In re Frere and Staveley Taylor & Co. and North Shore Mill Co.* (3), which is one of the cases which raise the difficulty. There the order appealed from was one directing an arbitrator to state a case pending an arbitration. The Court of Appeal, consisting of the Master of the Rolls and Stirling L.J., came to the conclusion that the decisions in *Watson* v. *Petts* (2) and *Long* v. *Great Northern and City Ry. Co.* (1) compelled them to hold that such a matter, as it related to an order to an arbitrator to state a case, was not a matter of practice and procedure in a cause or matter in the High Court.

In *In re Colman and Watson* (4), which came before the Court of Appeal, consisting of Vaughan Williams L.J. and Bigham J.,

(1) [1902] 1 K. B. 813.
(2) [1899] 1 Q. B. 54.
(3) [1905] 1 K. B. 366.
(4) [1908] 1 K. B. 47.

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the question was whether an appeal from an order of a judge at chambers upon an application to enforce an award of an arbitrator was an appeal in a matter of practice and procedure. Vaughan Williams L.J. called attention to a point which had not been considered in the previous case—namely, that a submission to arbitration which by s. 1 of the Arbitration Act, 1889, is to "have the same effect in all respects as if it had been made an order of Court," must be treated as if it had in fact been made an order of the High Court; that there was therefore an order in the High Court which it was desired to enforce; that, consequently, it was a matter of practice and procedure in the High Court; and, therefore, that the appeal lay to the Court of Appeal. It is extremely difficult—I think it is impossible—to reconcile that decision with that in *In re Frere and Staveley Taylor & Co. and North Shore Mill Co.* (1)

Apart from these decisions of the Court of Appeal, a Divisional Court, consisting of Pollock B. and Bruce J., decided in *In re Portland Urban District Council and Tilley & Co.* (2), that an appeal from a judge at chambers granting leave to revoke a submission to arbitration was in a matter of practice and procedure, and consequently that the appeal lay to the Court of Appeal. That decision, it will be noticed, was in accordance with that in *In re Colman and Watson* (3); and although the argument was not the same, it is justified by the fact that the revocation of a submission being a rule of Court is a matter in the High Court.

In 1916 this question came before a Divisional Court again in *Miller, Gibb & Co.* v. *Smith & Tyrer.* (4) The trouble there was that the matter began with a question whether there was a submission at all. If there was a submission then by the decision in *In re Colman and Watson* (3) the appeal would lie to the Court of Appeal; if there was no submission, it would lie to the Divisional Court. As Avory J. there said, it was odd that before deciding whether the appeal lay to the Court of Appeal they had to decide that there was a

(1) [1905] 1 K. B. 366.
(2) [1896] 2 Q. B. 98.
(3) [1908] 1 K. B. 47.
(4) [1916] 1 K. B. 419.

submission—the very matter in dispute. Lush J., in his judgment, took the view that *In re Portland Urban District Council and Tilley & Co.* (1) must be taken to have been overruled, not being reconcilable with *In re Frere and Staveley Taylor & Co. and North Shore Mill Co.* (2) Lush J. also said that *In re Colman and Watson* (3) did not affect the matter, but I am not quite sure why he said that.

The only other case in which this question has been considered was *Richardsons and Bradley & Co.* v. *Bernhard* (4), where Bankes L.J. and Greer J., sitting as a Divisional Court, took the view that where there is a submission the governing authority is *In re Colman and Watson* (3), but where the real question is whether there is a submission or not the principle of that case does not apply. Greer J. thought that if the party had entered into a submission, that would have been equivalent to a proceeding in the High Court, and any subsequent application would be a matter of practice and procedure.

The result of this series of cases, which I cannot regard as creditable to English jurisprudence, is this: there is the decision of five Lords Justices that "practice and procedure" mean practice and procedure in matters already in the High Court. Next, we have the provision of s. 1 of the Arbitration Act, 1889, that a submission, which formerly might be made a rule of Court and come upon the records of the Court, is now to be irrevocable except by leave of the Court, and is to have the same effect in all respects as if it were a rule of Court. As to what these words mean we have the guidance of the remarks of Bowen L.J. in *In re Smith & Service and Nelson & Sons* (5), where he said that the words "and shall have the same effect in all respects as if it had been made an order of Court" meant "that the submission, whether it be a general agreement to refer or not, is to have the same effect as would have been given to it before the statute by an act of the parties making it a rule of Court." It appears from

(1) [1896] 2 Q. B. 98.
(2) [1905] 1 K. B. 366.
(3) [1908] 1 K. B. 47.
(4) [1925] 2 K. B. 121.
(5) (1890) 25 Q. B. D. 545, 554.

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a statement of counsel for the Inland Revenue Commissioners in *Matthews* v. *Inland Revenue Commissioners* (1) that before the Arbitration Act, 1889, a submission was made a rule of Court by handing in a notice of motion to the proper officer indorsed with the consent of the other side. By s. 1 of the Arbitration Act, 1889, a submission is to have the same effect in all respects as if it had been made an order of Court, and a motion to revoke the submission relates to altering a matter which is already in Court. In these circumstances we follow the principle laid down by the five Lords Justices in *Watson* v. *Petts* (2), because, for the reasons I have stated, this is an application to alter a matter already in the High Court, and consequently it relates to procedure in the High Court. It appears to follow that the decision of the Divisional Court in *In re Portland Urban District Council and Tilley & Co.* (3) was correct, and that the principle laid down by Vaughan Williams L.J. in *In re Colman and Watson* (4) is that which in future should govern the question whether in such a matter the appeal lies to the Court of Appeal or to the Divisional Court. For these reasons the preliminary point fails.

GREER L.J. I agree, and I desire to add only a few words with regard to *In re Colman and Watson* (4) and the reference I made to it in *Richardsons and Bradley & Co.* v. *Bernhard.* (5) In *In re Colman and Watson* (4) the order appealed from was an order to enforce an award on a submission to arbitration under the Arbitration Act. A preliminary objection was taken that in that matter an appeal did not lie direct to the Court of Appeal. The Court, consisting of Vaughan Williams L.J. and Bigham J., dealt in the first place with the preliminary objection, and in doing so assumed that there was a submission to arbitration. The whole of the judgment of Vaughan Williams L.J. down to the end of the first paragraph on p. 50 of the report, proceeded on the assumption that there had been a valid submission to arbitration. The

(1) [1914] 3 K. B. 192.
(2) [1899] 1 Q. B. 54.
(3) [1896] 2 Q. B. 98.
(4) [1908] 1 K. B. 47.
(5) [1925] 2 K. B. 121.

preliminary point was decided on that footing. But Vaughan Williams L.J. afterwards dealt with the terms of the letters relied upon as constituting a submission, and came to the conclusion that there had been no submission of a dispute to arbitration. When dealing with the matter I used these words as reported: "Mr. Clement Davies relied upon *In re Colman and Watson* (1), but that case, I think, is distinguishable upon the ground that there the Court of Appeal decided that in fact there was a submission. Having decided that, it was clear that the question was a matter of practice and procedure arising in a matter in the High Court. For that reason it was decided that the appeal lay to the Court of Appeal." I ought to have said that the Court of Appeal dealt with the question upon the assumption that there had been a submission. Having assumed it, the question was a matter of practice and procedure arising in the High Court. With that emendation I adhere to what I said in *Richardsons and Bradley & Co.* v. *Bernhard.* (2) I agree that this preliminary point fails.

SANKEY L.J. I agree. I think it is impossible to reconcile the decision in *In re Frere and Staveley Taylor & Co. and North Shore Mill Co.* (3) with that in *In re Colman and Watson.* (1) I prefer to adopt the decision in the last mentioned case and the reasoning upon which it is founded. Vaughan Williams L.J. there said (4): "By s. 1 of [the Arbitration Act] it is provided that 'a submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a judge, and shall have the same effect in all respects as if it had been made an order of Court.' Therefore, where there is a submission within the meaning of that section, the case must, I think, be treated as if that submission had been made an order of the High Court." These words seem to me to be correct reasoning, and they apply to the present case. The preliminary objection therefore fails.

Preliminary objection overruled.

(1) [1908] 1 K. B. 47.
(2) [1925] 2 K. B. 121.
(3) [1905] 1 K. B. 366.
(4) [1908] 1 K. B. 50.

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SIMBRO TRADING CO. v. POSOGRAPH (PARENT) CORPORATION.

[The Court on a subsequent day heard the appeal on the merits and allowed it. This part of the case does not call for a report.]

Solicitors for appellants: *Blundell, Baker & Co.*
Solicitors for respondents: *Bulcraig & Davis.*

J. S. H.

K. B. D. 1929 *Jan.* 23.

C. A. *June* 13, 14.

EREAUT (INSPECTOR OF TAXES) *v.* GIRLS' PUBLIC DAY SCHOOL TRUST, LIMITED.

Revenue—Income Tax—School carried on by Company—Members of Company entitled to fixed Dividends—Claim to Allowance as Public School in respect of Buildings — Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. A, No. VI., r.* 1 (*c*).

Where a school is carried on by a company whose shareholders receive dividends not exceeding a fixed rate on their shares, the school, though otherwise possessing the essential characteristics of a public school, is not a public school so as to be entitled under r. 1 (*c*) of No. VI. of Sch. A of the Income Tax Act, 1918, to an allowance in respect of the assessment to income tax on the school buildings, for the existence of an element of profit-making for the private benefit of the founders and managers is fundamentally opposed to the conception of a public school.

So *held* by the Court of Appeal, affirming the decision of Rowlatt J.

CASE stated under s. 149 of the Income Tax Act, 1918, for the opinion of the High Court by the Commissioners for the General Purposes of the Income Tax Acts for the Division of West Brixton.

At a meeting of the above Commissioners held on July 14, 1927, four of the said Commissioners heard claims by the Girls' Public Day School Trust, Ld. (hereinafter called "the Trust"), for allowances under r. 1 (*c*) of No. VI. of Sch. A of the Income Tax Act, 1918, in respect of the amount of tax for the years 1920–21 to 1926–27 inclusive, charged on premises known as the Wimbledon High School for Girls (hereinafter called "the Wimbledon School"), and owned and occupied by the Trust.

The sole question for determination was whether the Wimbledon School was a "public school" within the meaning of the above rule.

The following facts were proved or admitted :—

The Trust was originally incorporated as a company named the Girls' Public Day School Company, Ld., on June 26, 1872, but in 1903 its name was altered to the Girls' Public Day School Trust, Ld., and subject to the sanction of the Court (as appears hereafter) a new memorandum was adopted, as appears in the following paragraphs.

The objects for which the Company was established were :—

(*a*) To establish and maintain in such parts of London and the Provinces as shall from time to time be determined public day schools for the education of girls of all classes above those provided for by the Elementary Education Act and to supply to girls on moderate terms general instruction of the highest class, together with moral and religious training.

(*b*) For the above purpose to purchase or acquire such land and erect purchase or hire and furnish such buildings as may be from time to time found desirable for the purpose of the Company.

(*c*) In connection with every school established and maintained by the Company, to provide means for training student teachers in the theory and practice of education.

(*d*) To do all such lawful things as are incidental or conducive to the above objects.

In 1905, by a special resolution confirmed by order of Court on January 16, 1906, the objects of the Trust were altered to those stated in the next sub-paragraphs :—

(i.) To establish and maintain in London and the Provinces public day schools for the education of girls of all classes above those provided for by the Elementary Education Acts and for the education of boys of the same classes while under twelve years of age, and to supply to such pupils on moderate terms general instruction of the highest class, together with physical, moral, and religious training, and to establish, maintain, and subsidise boarding houses for mistresses, student teachers, student pupils, and others connected with or attending such schools.

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(ii.) To provide in connection with any school maintained by the Trust means for training student teachers and students in the theory and practice of education.

(iii.) With the approval of the Board of Education to purchase or acquire such land and erect, purchase, or hire and furnish such buildings as might be from time to time found desirable for the above purposes.

(iv.) To borrow or raise money for the purposes of the Trust by mortgages, debentures, debenture stock, or otherwise, in such manner as might from time to time be determined with the approval of the Board of Education.

(v.) To do all such other things as were incidental or conducive to the above objects or any of them.

The memorandum of association of the Trust contained the following paragraph: "The income and property of the Trust whencesoever derived shall be applied solely towards the promotion of the objects of the Trust as set forth in the memorandum of association of the Trust, and no portion thereof shall be paid or transferred directly or indirectly by way of profit to the members of the Trust, provided that nothing herein contained shall prevent the payment in good faith of remuneration to any officer or servant of the Trust or to any member of the Trust or other person in return for any services actually rendered to the Trust, nor prevent the payment of interest (at a rate not exceeding 4 per cent. per annum), or repayment of capital in respect of money borrowed from or lawfully due to any member of the Trust, nor prevent the payment to the members for the time being of the Trust of interest at a rate not exceeding 4 per cent. per annum (free of income tax) on the amount of the respective subscribed and paid-up capital held by them respectively and the return to them of such subscribed and paid-up capital, and if any member of the Trust pays or receives any dividend, bonus, or other profit in contravention of the terms of this paragraph of the memorandum of association his liability shall be unlimited. If upon the winding-up or dissolution of the Trust there remains any property whatsoever after the satisfaction of all the debts and liabilities

of the Trust and payment to the members of such sums (if any) as may lawfully be payable to them in accordance with the preceding provision, such property shall not be paid to or distributed among the members of the Trust, but shall be given or transferred to some other educational institution or institutions having objects similar to objects of the Trust, such institution or institutions to be selected by the members of the Trust at or before the winding-up or dissolution or in default thereof by the Board of Education."

From 1905 to 1912 various amendments of the memorandum and articles of the Trust were made in consultation with the Board of Education (which was interested in the ultimate charitable trust) so as to give effect to the Board's wishes—namely, that the company should be converted into an educational trust at the end of a period not exceeding fifty years from 1905; that in the event of a winding-up before the expiration of that period the surplus assets of the Company should be subject to an educational trust and should not be distributed among the shareholders; that during the period mentioned above the dividend paid on share capital should not exceed a sum equal to 4 per cent. per annum. The alterations and extensions of the objects of the Trust were approved by the Court on December 12, 1911.

In the result, all existing shares in the Trust were converted into preference shares, and there were issued 100 "new" shares of 1*s.* each, having no rights to dividend but special voting rights in certain events. The holders were to be nominees of the Board of Education, to whom a large measure of control (including the power in certain events to compel a winding-up) was thereby secured.

The definition of the preference and the new shares was as follows:—

The preference shares were to receive out of profits, after setting aside a sinking fund of 1270*l.* 16*s.* a year (the amount then being paid for mortgage redemption) no greater dividend than a preferential dividend at the rate of 4 per cent. a year (free of income tax) on the amounts actually paid up thereon, deficiencies of such dividend in any one year being

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carried forward against the profits of the next succeeding year, but not later. They were to receive out of assets on winding-up the amounts actually paid up thereon without arrears of dividend, except in respect of the last two years before the winding-up took place, when 8 per cent. less any dividends already paid in respect of such two years was to be paid. In no circumstances were they to receive any greater amount than as stated above, either while the Trust continued or on winding-up. The new shares were to receive only the nominal amount paid up on them. Subject as above, the entire property was to pass on winding-up to an educational institution.

No dividends were to be paid on the new shares. But until January 15, 1956, the entire surplus profits remaining after paying the interest on the preference shares were to be applied either in reduction of the mortgage debts, or in any other manner which might be arranged, so as to reduce charges and provide for ultimate extinction; or to establish a fund which, on winding-up, might be available for enabling the preference shares to be paid off to avoid, so far as might be, the necessity of selling any of the schools belonging to the Trust; or otherwise to increase the capital value of the assets, or for any other purpose approved by the Board of Education, whereby the capital assets might be increased, the idea being that when winding-up came, the holders of the new shares might, so far as possible, get the schools handed over to an educational institution free from incumbrances.

Provision was then made in respect of voting powers.

On April 18, 1913, a prospectus was issued inviting the public to subscribe for further preference shares at par. Up to July 28, 1926, 30,659 preference shares of 5*l.* each and 100 new shares of 1*s.* each had been issued, all fully paid up. The total number of shareholders was 1799. There were no shares other than the new shares and the preference shares, and no issue of share capital could be made save with the approval of the Board of Education. If at any time either before or after January 15, 1956, the business of the Trust should be so carried on that for each of the two completed

financial years last preceding the proposal of a resolution for winding-up the Trust, the profits (after providing for certain named annual payments) should have been insufficient to pay any dividend on the capital for the time being paid up on the preference shares, then no new share, either before or after January 15, 1956, was to entitle the holder to any vote whatever against the resolution to wind up the trust. From time to time preference shareholders had surrendered their shares. Up to the present there had been so surrendered 492 preference shares representing 2460*l.*

Under the Secondary Schools Regulations the Board of Education were in a position to withdraw recognition for the purposes of Parliamentary grants failing compliance with any condition that the Board of Education might lawfully impose for the purpose of the grants or for any other purpose in relation to any of the schools owned and occupied by the Trust.

The Wimbledon School during all material dates was in receipt of Parliamentary grants from the Board of Education. The conditions of the receipt of those grants required that a school receiving them must not be conducted for private profit and the Board of Education had held that the Wimbledon School complied with that condition.

The Trust owned twenty-five schools in London and various parts of the country. Its receipts consisted of pupils' fees, Board of Education grants, and certain rents. In each of the material years down to 1925 the Trust had an excess of receipts over expenditure. In the years 1923, 1924, and 1925, it declared dividends of 4 per cent. free of tax and carried forward balances in addition. In 1920 and 1921 no dividends were declared, though there were surpluses of receipts over expenses, and in the year ending March 31, 1926, there was an excess of expenses over receipts amounting to 81*l.* on the year's working and no dividend was paid, though the balance carried forward from the previous year was sufficient to pay one.

The Trust's capital was derived from its share capital and from moneys borrowed on mortgage and to a small extent from

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gifts, and from accumulated profits and profits carried to reserves which amounted to 61,191*l.* 11*s.* 6*d.* The Trust also held certain trust investments.

Separate accounts were kept for each school, to which were credited the pupils' fees, Board of Education grants and rents applicable to the individual school, and to which were debited the actual expenditure of each school together with the particular school's proportion of the head office expenses. In addition, each school was debited with interest on capital at 5 per cent. as rent which was a book-keeping entry whereby that interest was debited to the individual school and credited to the Trust. The Wimbledon School, which was built in 1880, sustained excesses of expenditure over receipts amounting to 1041*l.*, 1271*l.*, and 228*l.* for the years ending December 31, 1920, and 1921, and the three months ending March 31, 1922, respectively, and in the four years ending March 31, 1923, 1924, 1925, and 1926, the school had excesses of receipts over expenditure amounting to 388*l.*, 232*l.*, 349*l.*, and 139*l.* respectively.

The Wimbledon School was managed by a governing body consisting of not more than twenty-four persons, one-third of whom were nominated by the Surrey County Council as the local education authority and the remainder were appointed by the council of the Trust. The governors carried on the general management of the school subject to financial control by the Trust. The fees charged at the Wimbledon School varied from 5*l.* a term to 11*l.* a term, and were to be approved by the Board of Education as suitable. In addition, certain trust scholarships were awarded as stated in the prospectus.

The Commissioners accepted the following evidence: The council of the Trust consisted of persons elected on account of their qualifications to administer education and their sole object was to maintain the schools of the Trust at the highest level of efficiency. The Board of Education exercised its charitable trusts jurisdiction over all the property of the Trust, and whenever any land was sold the sanction of the Board to the sale under the Charitable Trusts Acts

was obtained. So long as the Trust was in receipt of Parliamentary grants from the Board of Education, the Trust could not refuse to accept a pupil except on such ground as the Board of Education considered to be reasonable, and the Trust was bound to receive a certain number of free pupils, and among such pupils received scholars to whom scholarships were allotted by the local education authority.

It was contended on behalf of the Trust as follows:—

(*a*) That the Wimbledon School was a "public school" within the meaning of r. 1 (*c*) of No. VI. of Sch. A of the Income Tax Act, 1918, and that accordingly the Trust was entitled to the allowance claimed under that rule.

(*b*) Since the passing of the Endowed Schools Act, 1869, which expressly provided (s. 12) that "In framing schemes under this Act provision shall be made so far as conveniently may be for extending to girls the benefits of endowments" girls' schools had been regarded as on a par with boys' schools for all the purposes of the Education Acts. The distinction between public and non-public schools drawn by the Education Acts and statutory orders made under those Acts was that schools which complied with the conditions of a Parliamentary grant were public schools and that distinction was and always had been the basis of the definition of a public elementary school. (See Education Act, 1921, s. 27, sub-s. 1 (*d*).)

(*c*) An adequate measure of permanence to the school was insured by (*a*) the history and present constitution of the Trust; (*b*) the necessity imposed by the Charitable Trusts Amendment Act, 1855, s. 29, requiring the consent of the Board of Education to a sale of the land used by the school; and (*c*) the statutory power of the governing body to comply with the conditions prescribed for the receipt of grants in the regulations of the Board of Education notwithstanding any provisions contained in any instrument regulating the trusts or management of the school.

(*d*) Reference was made to clause 3 of the Trust's memorandum of association (setting out the objects of the Trust and providing that its income and property should be applied solely towards the promotion of those objects, subject as

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therein mentioned) and it was contended that in those respects the Trust was in a similar position in regard to whether it was a public school as Brighton College, which was the subject of proceedings, in relation to income tax, which was terminated by a decision of the House of Lords in *Brighton College* v. *Marriott*. (1)

(*e*) In the case of the Wimbledon High School there was present an eleemosynary element and the expenditure had exceeded the income over a long period of years.

It was contended on behalf of the Crown :—

(1.) That for the purposes of the present case the term " public school " was to be interpreted not according to its popular meaning nor by reference to distinctions between " public " and " non-public " schools drawn by the Education Acts, nor by reference to the type of education provided, but according to the special meaning attached to that term by the decisions of the Courts under r. 1 (*c*) of No. VI. of Sch. A of the Income Tax Act, 1918, and s. 61, Sch. A, No. VI., of the Income Tax Act, 1842.

(2.) That the admission of Brighton College as a public school by the Revenue was irrelevant to the present issue. Moreover the present case differed from the Brighton College case in that (inter alia) in the case of Brighton College there was no share capital and no member of the company which owned that school was entitled to any dividend or payment whatever out of that company's funds.

(3.) That the Wimbledon School was not a public school within the meaning of No. VI. of Sch. A of the Income Tax Acts of 1842 and 1918, as interpreted by the Courts in *Blake* v. *London Corporation* (2); *Cardinal Vaughan Memorial School Trustees* v. *Ryall* (3); and *Birkenhead School, Ld.* v. *Dring* (4) for the following reasons :—

(*a*) There was no charitable substratum. Neither the Wimbledon School in particular nor any of the Trust's schools

(1) [1926] A. C. 192.

(2) (1886) 18 Q. B. D. 437; (1887) 19 Q. B. D. 79; 2 Tax Cas. 209.

(3) (1920) 36 Times L. R. 694; 7 Tax Cas. 611.

(4) (1926) 43 Times L. R. 48; 11 Tax Cas. 273.

was provided by voluntary donations, but solely by the share capital, borrowed moneys and accumulated profits.

(*b*) There was not necessarily a perpetual foundation, inasmuch as in certain circumstances the Trust could be wound up and the school disposed of.

(*c*) No portion of the income was charitable. The Board of Education grants were paid for services rendered and in consideration of compliance with conditions laid down by the Board, and could not be regarded as charitable.

(*d*) Private persons had an interest in the school, inasmuch as the preference shareholders (numbering 1799) had a substantial interest in the school, both as to income and capital.

(*e*) The making of profit was clearly within the contemplation of the Trust and in fact was a necessary condition of the Trust's existence in that if for two successive years the Trust failed to pay a dividend, the preference shareholders could proceed to wind it up and the "new" shareholders were not entitled to oppose such a proposal.

After considering the facts and the contentions of both parties the Commissioners held that the Wimbledon School was a public school and accordingly allowed the claim of the respondent Trust.

The Crown appealed. The appeal was heard before Rowlatt J. on January 23, 1929.

Sir Boyd Merriman S.-G. and *R. P. Hills* for the Crown.
Latter K.C. and *Gurney Beagley* for the Trust.

ROWLATT J. I need not trouble you, Mr. Solicitor, because I think in this case it is not open to me to decide otherwise than to allow this appeal, and I do not think it was open really to the Commissioners to find as they did, having regard to the interest which the shareholders in this company—preference shareholders, as they are called—have in this Trust, and have in these schools.

This school is one of a number of schools kept and maintained by this Trust. Speaking quite generally the position is this, that the Trust was founded with no commercial

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motives—that is to say, it was not a case of persons thinking how they could get the best return on their investment consistent with safety, or anything of that sort. A number of persons doubtless were anxious to further education and felt sufficient interest in it, but still did not see their way to acquiring a very large sum of money by public subscription to start a school or series of schools. They saw that even with their great interest in education they could not afford to part with their money altogether, but that if the schools were started with a very limited reward in the shape of a share in the profits to those who subscribed—a limited and perhaps precarious right to share in the profits, but with a right also to get back their capital, if there was capital available for them, that on those terms they could collect a fund together and start schools. It was a very public-spirited thing to do, and nobody is cavilling about it at all, but in these cases it seems to me that I must be guided by what was laid down by the Court of Appeal in *Blake's* case (1), the City of London School case decided forty years ago, which has always been considered the leading declaration and guiding declaration of law upon this point.

In that case it was a school the existence of which was derived and provided entirely by funds of the Corporation, and so on. But the element which gave rise to the dispute in that case was that the pupils made payments for their education. Fry L.J. in his judgment, as reported in the Law Reports, which differs slightly, being a little condensed, from the actual verbatim report in the Tax Cases, says: "The school in this case has certain characteristics which denote a public school. It has a perpetual foundation: a portion of its income is derived from charity: it is managed by a public body: no private person has any interest in the school: no profit was or is in the contemplation of its founders or managers."

Those two last sentences are the crucial ones here: "No private person has any interest in the school: no profit was or is in the contemplation of its founders or managers." Then

(1) 19 Q. B. D. 79, 82.

Lopes L.J. put it rather more shortly, because he said: "The intention was to relieve schools not carried on for profit and in which the public were interested." Reading the two together, and especially looking at how Lopes L.J. summarizes it, I do think that here there is an absence of the two characteristics—that a portion of its income is derived from charity, and that no private person has any interest in the school, and that no profit was in contemplation. I think those two must be regarded as essential characteristics, and I do not think they are present here, and that is the ground of my decision.

Now what are the facts here? Preference shareholders, which really means all the shareholders except a few nominal shares, represent all the persons who subscribe the capital. What is their position? If the school pays its way—they are not doing so at present, but at least this one might—if it does pay, what is the result to all these persons? Why, they have got their 4 per cent. free of income tax, and as a fund accumulates that will ensure their getting their capital back, practically speaking, or nineteen-twentieths of it. Is it possible to say that the proprietors, who are private persons, have not had an interest in the school when it depends upon the prosperity of the school whether they get interest on their money—whether they get an interest return on their capital, or whether they get the capital itself back? In my view, it would be absolutely impossible to say that.

Mr. Latter has said that I ought to look at the substance of it, and, looking at it in that way, to say that these persons are really only in the position of creditors—that, although they are shareholders, they are wholly in the position of creditors. Of course, the school is mortgaged, and interest has to be paid, but that does not mean that the mortgagee is a private person having an interest in it. That is not the meaning of the words used. But I do think the answer is that they are not creditors; they are the proprietors; and their interest is not the interest of a creditor who is claiming a debt at all. They have simply to look at this property in this school as managers to give them what they are entitled

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to as proprietors. It seems to me that to say that is a matter of substance is not correct. It is really saying the thing is what it is not, and I cannot look at it in that way. I must leave somebody else to decide it if the case is to proceed on those lines, and I cannot see that I am justified in doing that.

Then, again, it is said here in this case that no profit was ever in the contemplation of the founders or managers. They are trying to make a profit; they must be trying. They are not sacrificing the efficiency of the school for monetary considerations. Of course not. But it was in the contemplation of the proprietors that this school should be run so as to pay for its outlay, and it would be very much better if it did, and that the school should be disembarrassed. That is a thing which is better for everybody, that the school should be free from incumbrance as a beneficial trust.

It is quite true that the Council of the Trust consists of persons elected on account of their qualifications in education. Their sole object is to maintain the school trust at the highest level of efficiency. That may be, but at the same time I cannot possibly say that profit is not in contemplation. The Commissioners have never said the contrary, but what they have said is this. They have said that a school receiving Parliamentary grants must not be conducted for private profit, and the Board of Education has held that the Wimbledon School complies with that condition. It would have been very much more material for the Commissioners to say that they held that, because what the Commissioners hold, in point of fact, is of great importance. What the Board of Education as a Board really held on any point is of no importance at all. I take the earliest opportunity of saying that very clearly. The Commissioners did not find it, and they cannot take the responsibility of saying what the Board hold from this point of view, but it is relevant from this point of view that the Commissioners have to decide what is the truth of that matter and not the Board of Education.

Upon the whole, therefore, it seems to me that upon the authorities there is only one answer to this case in this Court, and that is that the appeal must succeed with costs.

The Trust appealed. The appeal was heard on June 13, 14, 1929.

Latter K.C., *Edwardes Jones K.C.* and *Gurney Beagley* for the appellants. The question is whether the Wimbledon School is a public school so as to entitle the appellants to the allowance in respect of the assessment on school buildings given by Sch. A, No. VI., r. 1 (*c*), of the Income Tax Act, 1918. The exemption differs from the exemption given by s. 37 of the Act, because in the latter case it has to be proved that the buildings exempted are used for charitable purposes only. There is no such obligation under No. VI., r. 1 (*c*), of Sch. A. Therefore the only question is whether the Wimbledon School is a public school. The matters relied on as showing it is a public school are: (1.) the school is carried on with the aid of Government grants; (2.) the education is under the inspection of H.M. Inspectors under the Education Acts; (3.) no child can be refused admittance to the school except on grounds which the Board of Education consider reasonable; (4.) no denominational teaching is given except at the request of the parents; (5.) education is given free to a certain number of pupils; (6.) County Council scholars are received at the school; (7.) one-third of the governing body is appointed by the Board of Education. These are facts which amply justify the finding of the Commissioners that the Wimbledon School is a public school. In 1905 the shareholders of the appellant company surrendered all their rights except to a return of capital and to interest at 4 per cent., free of tax, after a sinking fund had been set aside to redeem mortgages. It was hoped by 1956 that the buildings would be clear of charges and the whole property subjected to educational trusts. There were no profits earned and the school was kept going by educational grants, the fees being fixed at less than cost. The school is therefore for the use of the public, governed by governors publicly appointed and subject to public control. The Commissioners were therefore entitled to hold that it was a public school. The question was one for the Commissioners

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and there is no ground for interfering with their decision: *Inland Revenue Commissioners* v. *Yorkshire Agricultural Society* (1); *Geologists Association* v. *Inland Revenue Commissioners.* (2) The test is whether the main object is to carry on the school for public purposes or for the benefit of the members by paying dividends. It is a question of degree and therefore a question of fact for the Commissioners. If there is a charitable element about the carrying on of the school then it is a question for the Court whether the school is a public school: *Blake* v. *London Corporation.* (3)

[SLESSER L.J. In that case the school was not being carried on for profit.]

That is so. There is no case of a company like this; but there is here evidence of the existence in the working of the school of a charitable element and there is evidence also of the school being carried on under public control for the public benefit; the question, therefore, of whether it is a public school is one of degree on which the decision of the Commissioners is conclusive. Fry L.J. in *Blake* v. *London Corporation* (3) does not lay down what are the essentials of a public school. He declines to define a public school but specifies certain matters which showed in his view that the school he was discussing was a public school. One of the matters was that "no private person has any interest in the school," but that is not a sine qua non of every public school. Sufficient elements of charity, public opportunity and public control suffice: *Ackworth School* v. *Betts* (4); *Cardinal Vaughan Memorial School Trustees* v. *Ryall* (5); *Birkenhead School, Ld.* v. *Dring* (6); *Brighton College* v. *Marriott.* (7) There is a charitable element here in the sense in which the word "charity" is defined in *Commissioners for Special Purposes of the Income Tax* v. *Pemsel.* (8) The vital test is whether the school is run for profit. Clearly it is not. The fees are not fixed on a commercial basis and 10 per cent. of the pupils are taken without any payment.

(1) [1928] 1 K. B. 611.
(2) (1928) Tax Leaflets Nos. 402 and 414.
(3) 18 Q. B. D. 437; 19 Q. B. D. 79, 81, 82.
(4) (1915) 6 Tax Cas. 642.
(5) 7 Tax Cas. 611.
(6) 11 Tax Cas. 273.
(7) [1926] A. C. 192.
(8) [1891] A. C. 531.

[They also referred to *Hall* v. *Derby Sanitary Authority* (1); *Shaw* v. *Halifax Corporation* (2); *Commissioners for Special Purposes* v. *University College of North Wales.* (3)]

Sir Boyd Merriman K.C. and *R. P. Hills* for the Crown. In this case there are two distinct things to be considered: (1.) the Trust or Company and (2.) the school. As regards the former the Board of Education have no jurisdiction. As regards the latter the Court in considering whether it is a public school will be guided by the statement of Fry L.J. in *Blake* v. *London Corporation* (4) as to the necessary characteristics of a public school—namely: "It has a perpetual foundation: a portion of its income is derived from charity: it is managed by a public body: no private person has any interest in the school: no profit was or is in the contemplation of its founders or managers." It would no doubt be going too far to say that unless all these characteristics are present the school is not a public school. But here the characteristic of permanency is wanting. There is nothing in its constitution to compel the Trust to carry on the school at Wimbledon up to 1956 or afterwards, or to prevent it from transferring its activities to another place. Further the existence of the element of profit making for the benefit of the members of the Trust is fundamentally opposed to the conception of the school being a public school. See also the observations of Lord Watson in *Dilworth* v. *Commissioner of Stamps* (5) and Greer L.J. in *Geologists Association* v. *Inland Revenue Commissioners.* (6)

[They were stopped.]

Latter K.C. replied.

LORD HANWORTH M.R. This case presents, at first sight, a great many difficulties, and we have had in consequence a very interesting argument upon the question that arises for our determination, but after examining the facts I have come to the conclusion that the judgment of Rowlatt J. was right and must be supported.

(1) (1885) 16 Q. B. D. 163, 173.
(2) [1915] 2 K. B. 170.
(3) (1909) 5 Tax Cas. 408.
(4) 19 Q. B. D. 79, 82.
(5) [1899] A. C. 99, 108, 109.
(6) (1928) Tax Leaflets No. 414.

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First of all, I want to deal with the nature and quality of the appellants. The appellants here are the Girls' Public Day School Trust, Ld. They are a company, and looking at their annual report—I have before me the report of the Council to the shareholders for the twelve months ending March 31, 1925, with the balance sheet and profit and loss accounts—that shows that the Company has an authorized capital of 200,005*l.*, divided into 40,000 preference shares of 5*l.* each, and 100 new shares of 1*s.* each. The annual report, at its close, says this : " As stated in the 1920 report, a repairs reserve account of 7000*l.* was created in that year to meet exceptional running expenses accumulated during the War. The arrears of repair work having been fully overtaken, the 7000*l.* was withdrawn in the past year from reserve as a contribution to the expenses in question. The surplus at the end of the year was 16,722*l.* After writing off ordinary depreciation, 4050*l.*, there remains a balance of 12,672*l.* to be carried forward. Out of this balance it is proposed to pay a 4 per cent. dividend, less income tax, on the preference shares, which, with the amount to be paid to the Income Tax Commissioners, will absorb 6131*l.*" It is plain from those excerpts that one is dealing with a limited company carried on and complying with the regulations which it is necessary for it to comply with under the Companies Acts. That company carries on a number of schools, and upon that share capital, to which I have already referred, in that particular year it proposed to pay a 4 per cent. dividend.

The assessment against which the Company appeal is an assessment in respect of the amount of tax for the years 1920–21, down to 1926–27, charged on premises situate at Wimbledon, in the county of Surrey, and known as the Wimbledon High School for Girls, which is owned and occupied by the Trust. As its name implies, the Company carried on the business of providing and equipping and maintaining certain schools for girls, and these premises, the Wimbledon School, is one of them. In respect of that Wimbledon School there was an assessment made. It was an assessment under

Sch. A. The relevant portions of the Schedule are: "Tax under Schedule A shall be charged in respect of the property in all lands . . . . for every twenty shillings of the annual value thereof," and under the General Rule, No. I., if the premises "are not let at a rackrent so fixed, then the rackrent at which they are worth to be let by the year." But there are certain exemptions granted from any such assessment. The one that is in question here is the exemption that is given under what is called No. VI. of Sch. A, that is to say, under the "Rules in respect of further Allowances," and the relevant one is r. 1 (*c*): "The amount of the tax charged on any hospital, public school, or almshouse, in respect of the public buildings, offices, and premises belonging thereto, and so far as not occupied by any individual officer or the master thereof whose total annual income, however arising, estimated in accordance with this Act, amounts to one hundred and fifty pounds or more, or by a person paying rent for the same." It is claimed that in respect of this assessment under Sch. A upon the Wimbledon School that school is entitled to this exemption given under the rule which I have read because it is a public school, and it is entitled under that rule to be immune from taxation in respect of the "public buildings, offices and premises belonging thereto." The question, therefore, that we have to decide is whether or not the appellants have brought themselves within the terms of the exemption. The Commissioners who heard the case came to the conclusion that they had.

Rowlatt J. has allowed the appeal from the Commissioners, and so the case comes before this Court.

It is plain that in some cases a school is a public school, and it is entitled to that exemption. Equally it is plain, as was stated by Lord Watson in *Dilworth* v. *Commissioner of Stamps* (1), that there are certain schools which are known as private schools, but the difficulty is to determine whether a particular school is entitled to this immunity as public or whether it is a private school or, at any rate, not entitled to this exemption. As the matter stands upon the facts which

(1) [1899] A. C. 99, 108.

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I have stated, it would appear that it was not entitled to exemption, for here is a company which has a school; it, in ordinary course, pays dividends upon its capital and, therefore, trading would seem to be connoted by the activities of the Company, and if that be so it would seem, within the observations made in the decided cases, that the Company had no claim to immunity for their school.

One difficulty which I have had throughout the case is to decide whether or not this point is one of fact, and if of fact, one essentially for the decision of the Commissioners; in other words, whether it was right for Rowlatt J. to impose his decision on a matter which had been determined as a question of degree and of fact by the Commissioners; and whether, therefore, in the same way, this Court could interfere with the decision of the Commissioners. But I have come to the conclusion that Rowlatt J. was right, and that the point upon which the case turns is one of law, and, therefore, that it is one on which he and this Court must express their effective opinion.

Certain rules or observations have been made to guide and assist those who have to try to determine what is a public school. I am rather inclined to agree with the view presented by Mr. Latter, that it would be putting the judgment of Fry L.J. too high to say that in the observations that he made in *Blake* v. *London Corporation* (1) he was, in any way, laying down characteristics which must be found and which are necessarily guides on one side or the other. But whether that be so or not, the observations in *Blake's* case (1) are, to my mind, of importance, and cannot be brushed aside. They are indicative of matters which must be taken into account. Fry L.J. in that case, summarizing some of the characteristics which denote a public school, said of that particular school (2): "It has a perpetual foundation: a portion of its income is derived from charity: it is managed by a public body: no private person has any interest in the school: no profit was or is in the contemplation of its founders or managers:" The

(1) 19 Q. B. D. 79. (2) 19 Q. B. D. 82.

reason why I have some doubt and rather incline to the view that Mr. Latter has presented to us is this, that, saying that a portion of its income is derived from charity, does not seem to be of assistance either one way or the other, for if the income is derived from charity then there are special exemptions in respect of that income, and whether or not the school is a public school it would, I think, if that income is devoted to charity, be entitled to exemption in respect of it. I have myself, in a judgment in *Brighton College* v. *Marriott* (1), shown that there are specific and appropriate exemptions in the case of income paid to charities quite apart from what may be called the general nature of the body that receives them. But with that remark I do not, in any way, wish to mitigate the great value of the observations of Fry L.J., and, indeed, they are also repeated in substance by Lord Watson in *Dilworth's* case. (2) I, therefore, turn to look at the features in the present case to see whether or not it can be said that this Company is a body in which no private person has any interest and no profit was or is in the contemplation of its founders or managers.

The Company was originally incorporated on June 26, 1872. Plainly enough it was incorporated for the purpose of doing a public service and providing advantages of education which, in the days of the early seventies, were by no means as easily obtainable as they are at the present day, and I have no doubt that those persons who joined together as corporators of the Company on its original incorporation were more minded to provide education than to seek any profit. At the same time, for the purpose of collecting money for the lofty objects they had in mind it was necessary to give some sort of return to those who would undertake the responsibility of subscribing to the Company's funds and so the structure of the Company was used, and the security of a limited company was given, and interest was made payable in respect of the share capital. That structure was much altered at a later date, as set out in the Case. The Company, which was called originally the Girls' Public Day School

(1) [1925] 1 K. B. 312. (2) [1899] A. C. 99.

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Company, had its name altered to the Girls' Public Day School Trust in 1905, and further alterations were made in 1911. But whatever the alterations were, there still remains this basis, that it is and was a company—whatever its name—that it still has an authorized capital of substantial amount 200,005*l.*, and that it still is bound to act and make its returns as a limited company, and that those persons who are shareholders are entitled, under certain circumstances, to the repayment of their share capital.

Now what are the circumstances which make those facts, which are plain enough as they stand, somewhat difficult to estimate on the point which we have to decide? The memorandum of association has ultimately taken a particular form, and we have the document before us as an exhibit. It is claimed by Mr. Latter, and rightly claimed, on behalf of his clients that one of its objects as it stands now, clause 3 (*c*), is "With the approval of the Board of Education to purchase or acquire such land, and erect, purchase or hire, and furnish such buildings as may be from time to time found desirable for the above purposes" and that there is in clause (*e*) a prohibition in these terms: "the income and property of the Trust whencesoever derived shall be applied solely towards the promotion of the objects of the Trust as set forth in the memorandum of association of the Trust, and no portion thereof shall be paid or transferred directly or indirectly by way of profit to the members of the Trust"; provided that the payment of a dividend of not exceeding 4 per cent. or the repayment of capital on a winding-up may still be made.

Mr. Latter also calls attention to certain of the articles. They are articles 5, 14, and others. I need not go through them all, but to take article 14: "No transferee of a preference share and no person becoming entitled to a preference share by transmission or in any other way than by transfer shall be registered as a member or have any of the advantages or privileges of a member unless approved of by the Council. And no transferee of a new share and no person becoming entitled to a new share by transmission or in any other way than by transfer shall be registered as a member or have any

of the advantages or privileges of a member unless approved of by the Board of Education," and there are other articles which show a connection between the Board of Education and the Company.

At the end of fifty years from the date when the plan was first originated, which brings the date, I think, to 1956, it is contemplated that the Company should be wound up, and that if there is any surplus after the repayment of the share capital that surplus should be devoted to an educational trust. Whether or not there is an educational trust at the moment seems a little more doubtful, but it is fair to say that such is the nature of the undertaking and the way in which it is carried on that there is a constant effort made to improve the schools which the Company carry on; to provide a good education in them; not to make use of any of its income beyond a possible 4 per cent. to the shareholders; and, in priority to that, or any dividend to the shareholders, there are provisions whereby the possessions of the Company shall be freed from mortgage debts, and the assets accumulated, not to the ultimate advantage of the preference shareholders, who would then on the winding-up be able to divide up the accumulated assets, but for the benefit of this educational trust in 1956. All those facts clearly point to the altruistic purposes of the Company, and, more than that, they indicate that there is a direct effort made on the part of the Company to maintain a standard which will enable it to justify a demand for a grant from the Board of Education towards the maintenance of a high standard of education, and there is no doubt that the Company is associated —I use that loose phrase—with the Board of Education. As pointed out in the Case, the Board of Education can intervene, or must be appealed to if the Company seeks to exercise some of its powers which otherwise would be quite independent of the Board of Education. For instance, in para. 4 (*d*) of the Case it is stated: "The Board of Education exercises its charitable trusts jurisdiction over all the property of the Trust and whenever any land is sold the sanction of the Board to the sale under the Charitable Trusts Acts is

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obtained." I therefore wish to give every possible credit to the Company for the manner in which it conducts its business for the purposes for which it is constituted, and to give full weight to its association with the Board of Education.

It is true that one of the reasons why the Company is associated with the Board of Education is that it desires to be able to receive grants. Those grants are paid to it and, to that extent, it increases the sum which is available as income for the purposes of the Trust, but the totality of the income, whether derived from one source or another, is undoubtedly expended in maintaining a high level of education in these schools. All that is true, but when that has been stated does it alter the character and nature of the structure of the Company? I feel compelled to say, No. The Company remains a company; the Company is seeking a profit. I use the word "seeking" in the usual income tax sense. In common parlance it is the last thing it is seeking; it is seeking to provide a good education for the pupils, who come to the schools, but technically it is seeking a profit, though it is only doing so for the purpose of providing a good education and in order that it may be able to pay the very limited reward to the shareholders of 4 per cent. and to accumulate, if possible, a sufficient amount of assets to enable the repayment of the capital to be made.

The facts that the Company is associated with the Board of Education and that it maintains these schools do not appear to me to eliminate from the basic nature of the Company the fact that it is a body of corporators associated together in carrying on the purposes of the Company.

Now if that be so, is it a question of fact or not? It was contended before the Commissioners that this Parliamentary grant and the manner in which the schools are carried on render the school a public school. I give full value to all that, but it does not seem to change the entity. In the *Brighton College* case (1), I went through a number of cases and dealt with the mode and circumstances under which there is some exemption given from the tax. But it all comes

(1) [1925] 1 K. B. 312.

back to this: Is this particular Wimbledon school a public school? It is owned by the Company and, subject to certain conditions which it would not be very difficult to comply with, the school could be closed and another school opened elsewhere, or possibly no school in the place of the Wimbledon school carried on. It seems to me, therefore, that the Company still retains its power of conducting its own business, and it cannot be said that the characteristics which (or some of which) must be found if it is a public school are complied with.

I will only add one word more on whether this matter is a question of fact. I agree that there are many facts here to be considered, and if it were possible to get away from the legal entity of the Company and the question of the shares and the dividend upon them, it might be possible to say that the Commissioners had complete seisin of the matter, but when one remembers that the legal structure of the Girls' Public Day School Trust, Ld., is a company, it seems to me impossible to say that it is a question of fact for them to determine.

For these reasons it appears to me that Rowlatt J. was right and that this is a matter upon which, as a matter of law, it was not possible for the Commissioners to come to the conclusion which they did, and that Rowlatt J. is right in holding that this particular school in respect of which exemption is sought has not established its claim to that exemption.

The appeal, therefore, must be dismissed with costs.

LAWRENCE L.J. This case raises an interesting question of some general importance—namely, whether a school (being one of a number) owned by a company registered under the Companies Acts with limited liability, and having a capital divided into preference and ordinary shares of fixed amounts upon which shares by its memorandum it is empowered to pay a dividend of limited amount—a power which it, in fact, exercises in respect of its preference shares—can properly be held to be a public school within the meaning

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of r. 1 (*c*) of No. VI. of Sch. A of the Income Tax Act, 1918; or, to put the question in another way: Does the fact that the Company is authorized to and does in fact apply part of the profits which it earns by carrying on the school in paying a dividend to its preference shareholders, necessarily prevent the school from being a public school?

Mr. Latter contended that the educational opportunities which the Company affords to members of the public, and the public control which is exercised over this particular school by the Board of Education and other public bodies, not only furnish ample evidence upon which the Commissioners could come to the conclusion that the school is a public school, but definitely stamp the school as a public school. He points to the fact that the school is in receipt of annual Government grants which, during the period under review, were not to be made to a private school; that, in order to earn such grants, the Company in the management of this school had to comply with the requirements of the Education Act of 1921, and of the regulations made by the Board of Education under that Act; and, further, that compliance with those requirements entailed (inter alia) the following consequences—namely, that the school had to be open to inspection by Government inspectors, that no pupil could be refused admission on other than reasonable grounds, that no formulary of any distinctive religious denomination might be taught in the schools except at the request of the parent or guardian of the pupil, that the rates of fees had to be approved by the Board of Education, that gratuitous education had to be provided for at least 10 per cent. of the pupils attending the school, and that one-third at least of the governing body had to be appointed by the Local Education Authority for Higher Education. He also relied on the fact that the scheme under which this school was conducted had received the approval of the Board of Education, and particularly, on the fact that by the memorandum of association of the Company the shareholders were only entitled to a limited dividend so long as the school was a going concern, and that on the winding-up they were only entitled to a return of the

capital paid up on their shares, and that any surplus went to some other educational institution or institutions, having objects similar to the objects of the Company. He contended that, as the preference shareholders were only entitled in a winding-up to receive the nominal amount of their shares and in the meantime were only entitled to 4 per cent. interest they were in substance and for all practical purposes in the position of debenture holders. In my judgment this contention is ill founded. There is a broad distinction between shareholders in a concern who as proprietors are making a profit out of it for their own private benefit and creditors of a concern who have lent money or supplied goods to the concern.

If it be open to the Commissioners to find that a school owned by a limited company paying a dividend to its shareholders is a public school, I agree that there is sufficient material in the present case upon which the Commissioners might have come to their conclusion, and that such a finding ought not to be disturbed. In my opinion the crucial question is whether the absence of private pecuniary interest and personal gain on the part of those who own and are concerned in the control of a school is or is not an essential characteristic of a public school. If, in a case where there is an element of profit making by those who have embarked their money in the concern, it be a question of degree, and the true test be whether the dominating motive of the founders and managers of the school is the provision of educational facilities for members of the public or the making of profit, then Mr. Latter is right in saying that it is a pure question of fact of which the Commissioners are the sole judges. On the other hand, if the existence of the element of profit making for the private benefit of the founders and managers is fundamentally opposed to the conception of a public school, then it is immaterial whether the dominating motive of the persons who embarked on the adventure was the furthering of public education, or the making of a profit. If the latter be the right view the Commissioners have come to a wrong conclusion and their finding cannot be upheld.

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Mr. Latter relies on *Blake's* case (1) as showing that the words "public school" are not words of art, and that the question whether a particular school is a public school is necessarily one of fact. Colour is lent to that argument by the following passage in the judgment of Denman J. (2): "I do not think that the words 'public school' in this Act must be construed as words of art. The question is what is the common understanding of those words, and that is a question not of law but of fact." It has to be remembered, however, what the question to be decided in *Blake's* case (1) really was. It was contended that the charge for tuition prevented the school from being a public school; that, in order to be a public school, it was essential that the education should be given gratuitously. The school was owned by a public body—namely, the Corporation of London. No question arose as to any profit making by the founders or owners of the school for their private benefit, but only as to the effect of the charges which were exacted for tuition and were applied towards meeting the expenses of the carrying on of the school. It is in the light of those facts that the passage in question must be read. Denman J. was not considering a case where the persons concerned in carrying on the school were dividing amongst themselves a profit derived from the carrying on the school. That case was taken to the Court of Appeal (3), and there some useful guidance for the decision of the present case is furnished by the judgments of Fry and Lopes L.JJ., who dwelt on the absence of certain characteristics which if they had existed would have tended to stamp the school as a private school. I agree with Mr. Latter that the Lords Justices did not attempt to lay down any exhaustive definition of a public school, nor did they say in words that if any one of the characteristics had been present that fact would necessarily have resulted in the school being a private school, but I think it is obvious from the judgments that both the Lords Justices considered that a school in which

(1) 18 Q. B. D. 437; 19 Q. B. D. 79. (2) 18 Q. B. D. 437, 445.
(3) 19 Q. B. D. 79.

private persons had a pecuniary interest and in which the making of a profit for their own personal benefit was in the contemplation of the founders and managers would not be a public school. Be that as it may, however, I have come to the clear conclusion that no school can be properly termed a public school where a distribution of the profits of carrying it on is made among the proprietors, and in my opinion it is quite immaterial that the profits so distributed are limited in amount and are in fact only distributed among a section of the proprietors. Such a distribution seems to me to introduce an element which precludes it from being what is termed in common parlance a public as distinguished from a private school.

Sir Boyd Merriman has referred us to a passage in the judgment of the Privy Council in *Dilworth's* case (1), and there is one sentence in that judgment which I think supports the conclusion at which I have arrived—namely, "Schools founded or maintained by the community, and managed by its representatives, are clearly public, while schools conducted by individuals for their own emolument are as clearly private." A company conducting a school for the emolument of its preference shareholders, in my judgment, comes directly within the purview of the latter part of that sentence, and stamps the school as a private, as distinguished from a public, school. In my judgment it is essential for the constitution of a public school that no person concerned in its foundation or maintenance should receive a personal pecuniary benefit out of the profits earned by carrying it on. For these reasons I think that Rowlatt J. was right in his decision, and that the appeal fails.

SLESSER L.J. I agree. In my opinion, the evidence before the Commissioners in this case was not such that as a matter of law they could find that this was a public school. The difficulty in part has arisen from the fact that there is no definition of a public school in r. 1 of No. VI. of Sch. A of the Income Tax Act, 1918, but when that rule is considered there are certain types of institutions—colleges, halls, hospitals and almshouses—all mentioned in the same rule as that

(1) [1899] A. C. 99, 108.

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dealing with public schools, which assists us in giving a construction to that term. Denman J. in *Blake's* case (1) says that in his opinion the object was to exempt not merely institutions which were purely charitable but "institutions ejusdem generis with the colleges and halls which form the first class of property exempted," and therefore were there no indication in any other authority as to what was the meaning of a public school, one would imagine from that collocation of words that there must be something of a real public nature in which the private emolument of a private individual is not sought. But, as a matter of fact, as has been pointed out by my Lords, in the Court of Appeal in *Blake's* case (2), there is a very valuable indication as to what is meant, or at least what must be looked for as part of the criterion in deciding whether a school is or is not a private school. At any rate, it does appear there, and it is also made clear, I think, in the decision of the Privy Council in *Dilworth's* case (3), that a school which is carried on for private emolument or profit is not properly to be regarded as a public school within the meaning of r. 1 (*c*) of No. VI. of Sch. A.

Here there is no doubt at all on the evidence which was before the Commissioners that, in fact, however laudable—and indeed it was laudable—was the motive of the Girls' Public Day School Trust, Ld., the constitution of the Trust and of the Company was such that interest at a rate not exceeding 4 per cent. was to be paid to the holders of the preference shares, and therefore, I think, it is impossible to say that this Company, or Trust, was not conducted at any rate as having as one of its objects the emolument of the corporators. If that be so, it seems to fall within the observations which we find in *Blake's* case (4), and Rowlatt J. in giving judgment in this case has applied the principles adopted by him in the earlier case of *Cardinal Vaughan Memorial School Trustees* v. *Ryall* (5), where he

(1) 18 Q. B. D. 437, 444.
(2) 19 Q. B. D. 79.
(3) [1899] A. C. 99.
(4) 18 Q. B. D. 437; 19 Q. B. D. 79.
(5) 7 Tax Cas. 611, 619.

says: "Now what is the position of the school? It satisfies the requirements which are indicated by Lord Justice Fry in the passage which is very well known in his judgment in *Blake* v. *Mayor, &c., of London* (1)"; requirements which, by reason of the purposes of profit here existing, are not satisfied in the present case.

For these reasons I think that the learned judge is right, and this appeal should be dismissed.

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Appeal dismissed.

Solicitors for appellants: *James Gray & Son.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

W. I. C.

SMART BROTHERS, LIMITED *v.* HOLT AND OTHERS.

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May 8, 16.

Landlord and Tenant—Distress—Exemption—Goods of Persons other than the Tenant—"Goods comprised in any . . . . hire purchase agreement"—Law of Distress Amendment Act, 1908 (8 *Edw.* 7, *c.* 53), *s.* 4, *sub-s.* 1.

The tenant of a dwelling-house hired goods from the plaintiffs under a hire purchase agreement by which he agreed to pay punctually the instalments and also the rent of the premises on which the goods might be. By a clause of the agreement, in case of any breach, the owners might, by written notice, forthwith determine the agreement, and thereupon neither party thereafter should have any rights under it. The instalments being in arrear, the plaintiffs served on the hirer a notice terminating the agreement, and claiming a return of the goods. A distress was subsequently levied on behalf of the landlord, and the goods the subject of the hire purchase agreement were seized.

In an action by the owners for illegal distress, the county court judge gave judgment for the plaintiffs:—

Held, that as soon as the notice terminating the agreement was given the right of the hirer to possession of the goods was at an end, and neither party to the agreement had any rights under it. When the distress was levied there was therefore no hire purchase agreement in force relating to the goods, and they were not at that time "comprised in any hire purchase agreement" within the meaning of s. 4 of the Law of Distress Amendment Act, 1908, and the distress was illegal.

Hackney Furnishing Co. v. *Watts* [1912] 3 K. B. 225 and *Jay's Furnishing Co.* v. *Brand & Co.* [1915] 1 K. B. 458 distinguished.

(1) 18 Q. B. D. 437; 19 Q. B. D. 79.

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SMART BROTHERS, LD. v. HOLT.

APPEAL from Nottingham County Court.

The following statement of facts is taken from the judgment of Talbot J. :—

The defendant, Mrs. Holt, was landlady of a house, 6 Cranmer Street, Nottingham, which was let at a rent of 100*l.* a year to a gentleman named Davison, and at Michaelmas of last year Davison owed her 62*l.* 10*s.* rent. He was also hirer of goods from the plaintiffs under a hire purchase agreement dated May 5, 1928. By the agreement he undertook, among other things, to pay punctually the monthly instalments, and also the rent of the premises on which the goods might be. The eighth clause of the agreement was as follows: "In case of any breach of any term hereof the Owners may: (*a*) Without prejudice to their claim for arrears of instalments or damages for breach of this Agreement forthwith without notice terminate the hiring and repossess themselves of and remove the goods: (*b*) Alternatively, by written notice sent (by post or otherwise) to or left at the Hirer's last known address forthwith and for all purposes absolutely determine and end this Agreement and the hiring thereby constituted and thereupon the Hirer shall no longer be in possession of the goods with the Owners' consent nor shall either party thereafter have any rights hereunder but such determination shall not discharge any pre-existing liability of the Hirer to the Owners." On September 28, 1928, the instalments were in arrear to the extent of 8*l.* 2*s.* 6*d.* On that day the plaintiffs served on Davison the following notice: "We beg to inform you that we have this day terminated our Agreement with you. Our van will be calling upon you within the next few days to collect the whole of our goods. Will you please have them in readiness for our van to collect." It is conceded that this notice must be taken to have been sent under clause 8 (*b*) of the agreement. On October 6 a distress was levied by the defendant Middleton on behalf of Mrs. Holt, and the goods in question, which were those subject to the hire purchase agreement, were seized. The other defendants are the bailiff, and the auctioneer by whom the goods were sold. On October 16 the plaintiffs duly served on all necessary

parties a declaration under s. 1 of the Law of Distress Amendment Act, 1908, setting forth that the goods in question were their property. The goods were sold on October 19. The plaintiffs, having sued the defendants in pursuance of s. 2 of the Act of 1908, recovered judgment for 85*l*.

The county court judge was of opinion that, having regard to the terms of the agreement, it had been effectually terminated so far as the furniture was concerned, and that the furniture was no longer comprised in a hire purchase agreement, and was therefore exempt from distress.

The defendants appealed.

T. J. O'Connor K.C. and *A. M. Lyons* for the defendants.
Stuart Bevan K.C. and *A. A. Pereira* for the plaintiffs.

Cur. adv. vult.

May 16. TALBOT J. [stated the facts and continued:] Broadly speaking, the Law of Distress Amendment Act, 1908, deprives landlords of the right to distrain upon goods of persons other than the tenant of the premises. But by s. 4 certain classes of goods are excepted, and as to those the right to distrain remains, as if the Act had not been passed. One of those classes is goods "comprised in any . . . . hire purchase agreement." Such goods are still distrainable, and accordingly the plaintiffs, who complain that their goods were illegally sold, maintain that they were not, when seized, comprised in a hire purchase agreement. The defendants, the landlady and her agents, maintain that they were. The question, therefore, is whether it is proved that the goods, which it is admitted were at the material time the plaintiffs', were at that time comprised in a hire purchase agreement. It appears to me that, according to the natural meaning of the words, goods could only be so described if there was at the time a hire purchase agreement relating to them which was in force and by which the rights of property and possession in them were regulated.

I think it is clear that as soon as the notice was sent under clause 8 (*b*) of the agreement, all right of Davison to the possession of the goods under the agreement was at

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an end, and neither party to the agreement had any rights under it. It follows that there was, when the distress was levied, more than a week after the notice was sent, no hire purchase agreement in force relating to the goods, and that therefore they were not at that time comprised in any hire purchase agreement.

There is, however, binding authority as to the construction of the words. In *Jay's Furnishing Co.* v. *Brand & Co.* (1) a hire purchase agreement contained the following words: "If the hirer does not duly perform and observe this agreement, the same shall ipso facto be determined, and the hirer shall forthwith at his own expense return the said goods to the owners, and the owners shall be entitled to retake possession of the same as being goods wrongfully detained by the hirer, and for that purpose to enter upon any premises where the said goods may be. Notwithstanding such return or retaking of the said goods, the hirer shall remain liable for arrears of hire up to the date of such determination of this agreement." The owner of the goods acting under this clause endeavoured without success to retake possession of them and the next day the landlord seized them under a distress. The question was whether, when seized, the goods were comprised in a hire purchase agreement. The judgments of Buckley and Phillimore L.JJ. explain the meaning of the words. Buckley L.J., after discussing the construction of the rest of the agreement and the effect of the words "shall ipso facto be determined," said (2): "The only question which remains is, were the goods still comprised in a hire purchase agreement on May 15, when the landlord distrained? I apprehend that chattels remain comprised in an agreement when there is still subsisting some contractual obligation under the agreement relating to the chattels. Under this agreement there remained at the date of the distress the right of the plaintiffs to enter upon the premises and retake possession of the chattels. Even if so much of the agreement as consisted of a demise had been brought to an end by the exercise of the plaintiffs' right to determine it, the agreement was still

(1) [1915] 1 K. B. 458. (2) [1915] 1 K. B. 465.

subsisting and bound the chattels in the sense that it gave the plaintiffs certain rights as against the chattels, the right to enter the premises and to seize the chattels and to deal with them. In these circumstances it seems to me that the chattels were still comprised in a hire purchase agreement." Now if, in the case before us, it is asked what contractual obligation under the agreement relating to the chattels was still subsisting when the distress was levied, the answer must be "none," and therefore they were no longer comprised in the hire purchase agreement. Phillimore L.J. (1) likewise founds his decision that the goods were still comprised in a hire purchase agreement "entirely upon the licence to enter upon premises to retake possession of the goods," and he goes on: "I do not say that the fact that certain contractual rights remain, as for instance the right to payment of rent or of damages for a breach of the agreement, would necessarily cause the goods still to be comprised in a hire purchase agreement, but I do say that when any right remains in respect of the goods themselves, such as the right to obtain possession of them, for which right recourse must be had to the agreement, the goods are comprised in a hire purchase agreement within the meaning of s. 4. It seems to me that this is the meaning and intention of the statute. It would be necessary for the plaintiffs to have recourse to the licence to retake possession contained in the agreement in order to get the benefit which they seek." It is evident that in the present case no right under the agreement in respect of these goods themselves was still in existence when they were seized. The learned Lord Justice obviously thought it would not be difficult for a furnishing company so to word its hire purchase agreements as to avoid the consequences of the form used by Jay's Furnishing Company in the case of *Jay's Furnishing Co.* v. *Brand.* (2) In my opinion the plaintiffs here have succeeded in doing this.

In *Hackney Furnishing Co.* v. *Watts* (3) it was held that the goods there in question were, when seized by the landlord,

(1) [1915] 1 K. B. 466. (2) [1915] 1 K. B. 458.
(3) [1912] 3 K. B. 225.

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comprised in a hire purchase agreement. "The owners," said Bray J., delivering the judgment of this Court, "cannot recover their goods without showing their title to do so under the agreement." It is plain that in the case before us the plaintiffs would be under no such necessity. Their right is merely that which the common law gives them, and they have no need to resort to the agreement at all: see *Gledstane* v. *Hewitt*. (1)

In my opinion the judgment of the learned county court judge was perfectly correct. The appeal must be dismissed.

WRIGHT J. I agree. The case depends on the issue whether the goods were comprised in a hire purchase agreement within the meaning of s. 4 of the Law of Distress Amendment Act, 1908. They were at one time so comprised in the hire purchase agreement dated May 5, 1928, but the question is whether they were so comprised after the letter of September 28, 1928, terminating that agreement and stating that the plaintiffs' van would attend and collect the goods. The rent being in arrear, the plaintiffs had a right, under clause 8 (*b*) of the agreement, to give a notice terminating the agreement in the terms of that clause which has been read by my Lord. Having regard to the points taken by the learned county court judge, the notice must be held to have been given under clause 8 (*b*).

Notwithstanding the strenuous argument of Mr. O'Connor, I agree with my Lord that the notice put an end to the agreement, leaving the plaintiffs with no right to repossess themselves of the goods under any special power granted by the agreement such as would be granted under clause 8 (*a*) if they had availed themselves of that clause. Clause 8 (*b*), on the contrary, though providing that rights of a personal character, such as claims for arrears of rent, should remain, had the effect of removing the goods from the ambit of the agreement; the goods remained the property of the plaintiffs, but the licence to the defendants had been revoked by the

(1) (1831) 1 Cr. & J. 565.

notice given under the agreement; the defendants had, after the notice, only such rights as flowed from that position at common law, that is, such rights as an owner of goods has as against a person who no longer has a right to the possession of the goods and who is holding without the owner's consent. The owner has, in such a case, no right of entry to retake possession; he can merely ask for delivery of the goods, and if refused delivery may fall back upon the aid of the Court to give him possession in an action of detinue. I think in such a case it cannot be said that the goods are comprised in the hire purchase agreement at the material time, that is, the levy of distress, when, as here, the owner of the goods has previously terminated the agreement by a notice duly given, as required by its terms. In an action of detinue following upon such a refusal by the hirer to redeliver, the agreement of hiring under which the bailment was made would be irrelevant except as matter of history or inducement; "the detainer is the gist of the action," as Lord Lyndhurst C.B. said in *Gledstane* v. *Hewitt*. (1)

The terms of the agreement in question distinguish this case from that of *Jay's Furnishing Co.* v. *Brand* (2), because in that case the provision was that, on default, not only should the agreement be determined but the owner of the goods should be entitled to retake possession, and for that purpose enter upon any premises where the goods might be. [The learned judge read the passages from the judgments set out above in the judgment of Talbot J. and continued:] In the earlier case of *Hackney Furnishing Co.* v. *Watts* (3) the relevant clause was in similar terms, and the Divisional Court gave it the same effect, and held that the goods were still comprised in the agreement.

I think the plaintiffs in this case have, by "apt words" such as Phillimore L.J. contemplated in *Jay's Furnishing Co.* v. *Brand* (4), taken themselves out of the cases referred to and escaped the operation of s. 4 of the Law of Distress Amendment Act, and hence the

(1) 1 Cr. & J. 565.
(2) [1915] 1 K. B. 458.
(3) [1912] 3 K. B. 225.
(4) [1915] 1 K. B. 458, 466.

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distress was unlawful and the plaintiffs were entitled to succeed in their claim.

Appeal dismissed.

Solicitors for plaintiffs: *Tudor & Rowe.*

Solicitors for defendants: *Peacock & Goddard, for Clifton, Woodward & Smith, Nottingham.*

F. C.

1929

May 28.

PEARCE *v.* BRAIN.

Infant—Contract—Void Agreement—Exchange of Chattels—Consideration—Infants Relief Act, 1874 (37 & 38 *Vict. c.* 62), *s.* 1.

A contract for the exchange of chattels entered into by an infant is a contract for goods supplied and (if not for necessaries) is absolutely void under the Infants Relief Act, 1894, s. 1. But an action by an infant plaintiff for the recovery of a specific chattel transferred to the defendant under such a contract will not succeed, unless the plaintiff can show a total failure of consideration. The same principles apply in such an action as in an action for the recovery of money paid under a void agreement.

Valentini v. *Canali* (1889) 24 Q. B. D. 166 followed.

APPEAL from Clerkenwell County Court.

The plaintiff, an infant suing by his next friend, brought this action in the county court for the recovery of a motor-cycle and side-car or in the alternative for their value on the ground that the contract under which he delivered the motor-cycle to the defendant was void under the Infants Relief Act, 1874, or in the alternative was voidable and had been avoided by him.

The contract in question was made on February 10, 1928, when the plaintiff exchanged his motor-cycle and side-car for a second-hand motor-car belonging to the defendant. For the purpose of the transaction it was agreed that each vehicle was of the value of 30*l.*

The plaintiff took possession of the car and drove it away, handing over his motor-cycle to the defendant.

On February 14, 1928, after being driven by the plaintiff for about 70 miles in all, the car broke down owing to a defect in the back axle. On February 16, 1928, the plaintiff wrote

repudiating the contract on the ground that he was an infant when he entered into the contract.

He claimed the return of the motor-cycle and offered to return the damaged car to the defendant. The defendant refused, and the plaintiff then brought this action in the county court, which was tried at Clerkenwell by a judge and jury. The jury found that the car was not a "necessary" for the plaintiff, that the defendant gave no warranty as to the car and that it was worth 15*l.* only, but that the motor-cycle and side-car was worth 30*l.* It was admitted by the plaintiff that the defendant had acted in good faith.

The county court judge held that the contract was one of exchange and not, as the plaintiff alleged, a sale of the motor-cycle for 30*l.* with a sale of the car by the defendant for 30*l.*; that it was void under the Infants Relief Act, 1874, s. 1, but that as the plaintiff had enjoyed the benefit of the contract he was not entitled to recover the consideration which he had given: *Valentini* v. *Canali.* (1)

The plaintiff appealed from this decision, the material grounds of appeal being that the county court judge was wrong in law in holding (1.) that notwithstanding the proved inadequacy of the consideration the contract was for the benefit of the infant so as to disentitle him to the protection of the Infants Relief Act, 1874; (2.) that notwithstanding the defect in the rear axle of the car at the time of the contract, the plaintiff by using the car on five days without knowledge of the defect took benefit under the contract so as to deprive him of the protection of the Act; (3.) that the inability of the plaintiff to return the car in the same condition as at the contract disentitled him to the protection of the Act, although the defect causing the inability was in existence at the time of the contract.

R. J. White for the plaintiff. This transaction was void under the Infants Relief Act, 1874, s. 1, as being a contract for "goods supplied." No property passed under the contract, and the effect is that the defendant holds the cycle or its value to the use of the plaintiff. Had the claim in *Valentini* v.

(1) 24 Q. B. D. 166.

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Canali (1) been put upon this ground, instead of on the ground of a total failure of consideration, it might have succeeded. The plaintiff here has not derived any pecuniary advantage from the contract and is entitled to succeed as on a void contract.

The effect of the proviso to s. 1 of the Act of 1874 is that contracts for the supply of goods to an infant are void, if apart from the Act they would have been voidable. If, however, it is held that the contract was not void but was voidable, the circumstances as at the date of the contract alone must be considered. If at that date the contract would, apart from the Act, have been voidable it was void, and subsequent events could not make it valid. The plaintiff was taking a car of 15*l.* value in exchange for a cycle of 30*l.* value, which cannot be regarded as a contract for his benefit.

In *Steinberg* v. *Scala* (*Leeds*), *Ld.* (2), an infant sought to recover money paid to a company upon an allotment of shares to her, but failed because she could not show a total failure of consideration. That case was not within the Act of 1874, and so the Court was dealing with a voidable and not a void contract; but even there Lord Sterndale M.R. in his judgment is careful to distinguish between the right to rescind (which is here claimed) and the right to recover money paid under it, which was there in issue. He cites Turner L.J. in *Ex parte Taylor* (3) as saying: "It is clear that an infant cannot be absolutely bound by a contract entered into during his minority. He must have a right upon his attaining his majority to elect whether he will adopt the contract or not. It is, however, a different question whether if an infant pays money on the footing of a contract, he can afterwards recover it back." "That," says Lord Sterndale, is "only stating in other words the principle which is laid down in a number of other cases that, although the contract may be rescinded the money paid cannot be recovered back unless there has been an entire failure of the consideration for which the money has been paid." (2) Here it is rescission which the plaintiff claims.

(1) 24 Q. B. D. 166. (2) [1923] 2 Ch. 452, 458, 462.
(3) (1856) 8 D. M. & G. 254, 257, 258.

Alexander Anderson for the defendant. This transaction does not differ from a contract for sale of a chattel. Unless the plaintiff can show a total failure of consideration he cannot recover. In *Steinberg* v. *Scala* (*Leeds*), *Ld.* (1), Warrington L.J. said: "In the case of an infant plaintiff seeking to recover money paid, the question is not whether the infant has derived any real advantage from the contract. I cannot see myself, in the case of an action to recover money actually paid, any difference between the position of an infant and an adult, and an adult can only recover money actually paid if there has been a total failure of consideration." There has been no such total failure here. On the contrary, prior to the breakdown the infant had enjoyed and driven the car. That being so, he cannot recover money paid: *Valentini* v. *Canali*. (2) The contract here was a contract of exchange of chattels and not for the sale of chattels; but the principle must be the same, although there is no authority to that effect.

R. J. White in reply. Whether the contract was void or voidable the plaintiff here is entitled to recover the cycle. *Valentini* v. *Canali* (2) may have been wrongly decided, but whether this is so or not, it is distinguishable from the present case. For here the claim is for the return of a chattel which can be earmarked. This claim is distinct from a claim for the recovery of money, brought as on a total failure of consideration.

SWIFT J. [after stating the facts continued:] The only point left is the contention of the plaintiff that, as he was an infant at the time the contract was entered into, the contract was rendered void by s. 1 of the Infants Relief Act, 1874. It was said that the property in the motor bicycle never passed from the plaintiff to the defendant and that the plaintiff was entitled to have it back by virtue of s. 1 of the Act, which provided: "All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods

(1) [1923] 2 Ch. 452, 458, 462. (2) 24 Q. B. D. 166.

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supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void: Provided always, that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable."

In his able argument counsel for the plaintiff contended that the transaction was one which was void under that section, and that therefore the plaintiff had never ceased to be the owner of the motor bicycle and was entitled to have it back. I am quite clear that the transaction was, as the county court judge has found, a contract of exchange of goods. But it comes within the words "goods supplied or to be supplied," which are as much applicable to exchange as to sale.

If I were at liberty to decide this case without authority, I should be inclined to accept the argument for the plaintiff and decide that the contract being by way of exchange it was void under the Act and that no property passed. (1) But I cannot see any difference in principle between the recovery of a chattel given in exchange and the recovery of money paid as the purchase price of goods. If the contract were void by statute I should have thought, apart from authority, that money paid could have been recovered as money had and received to the use of an infant plaintiff. Money paid under a merely voidable contract is in a very different position. But there is direct authority that money paid under a void contract cannot be recovered unless there is a total failure of consideration. In *Valentini* v. *Canali* (2), which was decided by Lord Coleridge C.J. and Bowen L.J. sitting as a Divisional Court, Lord Coleridge said: "The construction which has been contended for on behalf of the plaintiff would involve a violation of natural justice. When an infant has paid for something and has consumed or used it, it is contrary to natural justice that he should recover back the money which he has paid. Here the infant

(1) [See *contra Stocks* v. *Wilson* [1913] 2 K. B. 235.—F. P.]
(2) 24 Q. B. D. 166, 167.

plaintiff who claimed to recover back the money which he had paid to the defendant had had the use of a quantity of furniture for some months. He could not give back this benefit or replace the defendant in the position in which he was before the contract. The object of the statute would seem to have been to restore the law for the protection of infants upon which judicial decisions were considered to have imposed qualifications. The legislature never intended in making provisions for this purpose to sanction a cruel injustice."

That case the county court judge treated as binding on him and adopted as the basis of his decision. He came to the conclusion that the plaintiff had had the benefit of the contract and that, although he had not had everything which he expected to get, there was not a total failure of consideration.

In view of *Valentini* v. *Canali* (1) I think his decision was right. I cannot distinguish between the recovery of a specific chattel under a void contract and the recovery of money. If the latter cannot be recovered, neither can the former. In order to succeed here it was incumbent on the plaintiff to show a complete failure of consideration; this he has failed to do, and in my view the decision of the county court judge was right and the appeal must be dismissed.

ACTON J. I agree.

Appeal dismissed.

Solicitors for plaintiff: *Daphnes.*

Solicitors for defendant: *Swepstone, Stone, Barber & Ellis.*

(1) 24 Q. B. D. 166, 167.

F. P. F.

1929
June 5, 6.

BERRY *v.* BERRY.

Contract—Deed—Variation by unsealed Writing—Prevalence of Rules of Equity—Supreme Court of Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 11—*Supreme Court of Judicature (Consolidation) Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 44.

By a deed of separation dated March 4, 1920, the husband covenanted to pay a monetary allowance to the wife. By an agreement in writing not under seal dated June 25, 1928, the parties agreed that the terms of the deed regarding the allowance should be varied in certain respects. In March, 1929, the wife instituted proceedings claiming arrears of allowance under the deed :—

Held, that, applying the rules of equity which must prevail when there is any conflict or variance between them and the rules of the common law with reference to the same matter, the plea by the husband of the simple contract of June 25, 1928, was a good defence to the wife's action under the deed.

APPEAL from Mayor's and City of London Court.

By a deed of separation executed on March 4, 1920, between the defendant, Edward William Berry, and the plaintiff, his wife, Catharine Harriet Berry, it was recited that the parties had agreed to live separate from each other for the future, and the defendant covenanted with the plaintiff (inter alia) as follows: "(*c*) The husband shall forthwith pay to the wife the sum of 12*l.*, and shall during the joint lives of himself and the wife, if they shall so long live separate from each other, whether the marriage is dissolved or not, pay to the wife an annual sum of 216*l.* free of income tax for her separate use without power of anticipation, the said annual sum to be paid by equal monthly instalments in advance on the first day of each month. . . . ."

By an agreement in writing between the parties dated June 25, 1928, which was not under seal, it was recited that the defendant had represented to the plaintiff that he was unable to continue the payments under clause (*c*) of the deed of March 4, 1920, owing to his earnings being insufficient, and it was agreed that the payments referred to in the deed should be varied in the following manner: "that is to say, the said Edward William Berry shall pay to the said Catharine Harriet Berry the sum of 9*l.* sterling on

July 1 next, and thereafter the sum of 9*l.* sterling on the first day of each and every month so long as the said Edward William Berry's earnings from every source whatsoever shall not exceed the sum of 350*l.* per annum, and the said Edward William Berry shall pay to the said Catharine Harriet Berry in the same manner as the principal sum of 9*l.* per month before mentioned a sum equal to 30 per centum per annum calculated monthly on any amount in excess of 350*l.* per annum which he may earn."

In March, 1929, the plaintiff instituted the present proceedings in the Mayor's and City of London Court, claiming from the defendant 54*l.*, being the difference between six monthly instalments at the rate of 18*l.* a month under clause (*c*) of the deed of March 4, 1920, and six monthly payments of 9*l.* each made by the defendant under the agreement of June 25, 1928. In defence the defendant relied on the agreement of June 25, 1928.

The county court judge held that it would be inequitable for the plaintiff to be entitled to insist on the provisions of the deed when she had entered into an agreement which varied its provisions, and he gave judgment for the defendant with costs.

The plaintiff appealed.

Shove for the plaintiff. A covenant in a deed cannot be varied by a subsequent written agreement not under seal. That was the common law rule before the passing of s. 25, sub-s. 11, of the Supreme Court of Judicature Act, 1873 (for which s. 44 of the Supreme Court of Judicature (Consolidation) Act, 1925 (1), has now been substituted), and it has not been altered by that provision. If it were otherwise,

(1) By s. 44 of the Supreme Court of Judicature (Consolidation) Act, 1925 (re-enacting s. 25, sub-s. 11, of the Supreme Court of Judicature Act, 1873): "Subject to the express provisions of any other Act, in questions relating to the custody and education of infants and generally in all matters not particularly mentioned in this Act, in which there was formerly or is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail in all courts whatsoever in England so far as the matters to which those rules relate are cognisable by those courts."

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the binding character of a formal contract under seal would be entirely lost.

[He was stopped.]

Geoffrey Howard for the defendant. It is conceded that at common law a deed could not be varied by a simple contract: see ex. gr. *West* v. *Blakeway*. (1) In equity, however, the rule has always been that a simple contract which varies a deed is a good defence to an action on the deed: Leake on Contracts, 7th ed., pp. 598, 599; Chitty on Contracts, 17th ed., p. 6; Bullen and Leake on Pleadings, 8th ed., p. 581*n*. Since the Supreme Court of Judicature Act, 1873, the same defence is available in a Court of common law. In *Nash* v. *Armstrong* (2) a parol agreement not to call for the performance of a deed and varying some of its provisions was held to be a good consideration for the promise to perform the substituted contract. According to the rule in equity, which must prevail, accord and satisfaction must be taken to be an answer to an action on a deed: *Steeds* v. *Steeds*. (3) If a deed can be discharged by a subsequent simple contract a fortiori it can be varied by the same means. In the present case the terms of the written contract of June 25, 1928, constitute accord and satisfaction of the covenant in the deed. Had the defendant's income increased, the plaintiff would have benefited, and there was, therefore, consideration for the variation.

[He also referred to *Goss* v. *Nugent* (*Lord*) (4) and *Kellett* v. *Stockport Corporation*. (5)]

Shove in reply. The difference between variation and rescission of a contract is a real one: per Lord Dunedin in *Morris* v. *Baron & Co.* (6) A written contract cannot be varied by parol: Fry on Specific Performance, 6th ed., p. 478. The conclusion to be drawn from that passage is that in equity a deed cannot be varied by parol. Therefore, in the present case, there is no conflict between law and equity. A contract to rescind is a subsequent collateral contract

(1) (1841) 10 L. J. (C. P.) 173; 2 Man. & G. 729.
(2) (1861) 10 C. B. (N. S.) 259; 30 L. J. (C. P.) 286.
(3) (1889) 22 Q. B. D. 537.
(4) (1833) 5 B. & Ad. 58, 64.
(5) (1906) 70 J. P. 154.
(6) [1918] A. C. 1, 25.

which can be pleaded in defence to an action on the original contract, but variation is something grafted on the original contract and is only to be enforced as part of it. The passages in the text-books which have been referred to on behalf of the defendant were all based on *Steeds* v. *Steeds* (1), but in that case rescission and not variation was being considered. In *Nash* v. *Armstrong* (2) the action was brought not on the original deed but on a collateral contract not to proceed on it.

SWIFT J. In my opinion, the judge of the City of London Court was right in the determination at which he arrived and this appeal should be dismissed.

It is clear, as was said by Bosanquet J. in *West* v. *Blakeway* (3), that "no rule of law is better established than that a covenant cannot be varied or dispensed with, but by some contract of equal value; and this covenant, therefore, cannot be varied but by some instrument under seal." But, although that was the rule of law, the Courts of Equity have always held themselves at liberty to allow the rescission or variation by a simple contract of a contract under seal by preventing the party who has agreed to the rescission or variation suing under the deed. In *Nash* v. *Armstrong* (2) it was held that a parol agreement not to enforce performance of a deed and to substitute other terms for some of its covenants was a good consideration for a promise to perform the substituted contract, even although the deed be not thereby released. In the course of the argument Willes J. said he would have thought "the agreement a good answer" by way of equitable plea. As my brother Acton has pointed out, Willes J. added (4): "The payment of the 70*l.* under the agreement would surely be ground for an unconditional perpetual injunction against proceeding upon the deed."

That being the state of the law and of the equitable practice, the Supreme Court of Judicature Act, 1873, provided, by s. 25. sub-s. 11, that "in all matters in which there is any

(1) (1889) 22 Q. B. D. 537. 30 L. J. (C. P.) 286.
(2) (1861) 10 C. B. (N. S.) 259; (3) 10 L. J. (C. P.) 173, 177.
(4) 10 C. B. (N. S.) 259, 262.

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conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail." That provision is now re-enacted by s. 44 of the Supreme Court of Judicature (Consolidation) Act, 1925. It seems to me, therefore, that, when the question arises whether or not a deed can be varied by any agreement which is not itself contained in a deed we must have regard to the principles which Courts of Equity would have applied to the matter when the rules of the common law would have prevented such a thing being done. Those principles were applied by this Court in *Steeds* v. *Steeds*. (1) That was an action by two obligees of a common money bond to which the defendant pleaded accord and satisfaction by delivery of stock and goods to one of the plaintiffs. On an application to strike out the defence as being no answer to the action, it was held that, according to the rule in equity, which was to prevail, accord and satisfaction must be taken to be an answer to an action for a specialty debt. In the course of the judgment of the Court, which was read by Wills J., he said (2): "It is clear that at law accord and satisfaction of a debt due upon a bond is no bar to the action. This is, however, purely the result of a technicality absolutely devoid of any particle of merits or justice, viz., that a contract under seal cannot be got rid of except by performance or by a contract also under seal; so that supposing it had really been the case that in satisfaction of an overdue bond for 1000*l*. the person liable had given property worth 2000*l*., which had been accepted in discharge of the obligation, still at law the obligee of the bond might recover his 1000*l*. without returning the property. One would have thought that if the Courts of Equity ever interfered at all to prevent a man from enforcing an unconscientious and dishonest demand to which there was no answer at law, they would perpetually restrain an action brought under the circumstances described. Mr. Wood, however, who is an equity lawyer, contended before us that this was a case in which equity would follow the law, and would refuse to interfere, and he laid great stress upon a case of *Webb* v.

(1) 22 Q. B. D. 537. (2) 22 Q. B. D. 539.

Hewitt (1), which he said established that proposition. We are glad to say that we are unable to agree with him, and that we think he has done injustice to a system of which one recommendation has been supposed to be that it was, sometimes at all events, competent to correct some of the worst and most odious technicalities of the common law. That case cited appears to us to lead to the opposite conclusion to that contended for, and we think it perfectly clear that the ratio decidendi of the learned Vice-Chancellor was, that when the plaintiff had accepted money's worth in place of money in discharge of the bond, the debt in equity was gone and there was an end of it."

In the present case the plaintiff by the simple contract of June 25, 1928, took in exchange for the 18*l.* a month to which she was entitled under the deed a sum of 9*l.* per month with the advantage of receiving 30 per cent. of her husband's earnings if they should exceed 350*l.* a year. Having acted under that agreement of 1928 for some time, she wishes to repudiate it and to enforce the original deed. In my view, it would be inequitable to allow her to do so.

ACTON J. I agree.

Appeal dismissed.

Solicitors for plaintiff: *Vizard, Oldham, Crowder & Cash.*
Solicitors for defendant: *Windsor & Brown.*

(1) (1857) 3 K. & J. 438.

G. F. L. B.

1929
May 1, 2.

SHEFFIELD CORPORATION *v.* KITSON.

Local Government—Public Health—Hackney Carriage—Licence—Unlicensed Carriage—Penalty—Information—Person aggrieved—Attorney-General's Consent—Town Police Clauses Act, 1847 (10 & 11 *Vict. c.* 89), *ss.* 37–68, *s.* 73—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 171, *s.* 253.

By the Public Health Act, 1875, s. 253: "Proceedings for the recovery of any penalty under this Act shall not, except as in this Act is expressly provided, be had or taken by any person other than by a party aggrieved, or by the local authority of the district in which the offence is committed, without the consent in writing of the Attorney-General."

A corporation was convicted upon an information preferred on behalf of a limited company under the Town Police Clauses Act, 1847, s. 47, by one of its directors, for permitting a motor omnibus to be used as a hackney carriage within the prescribed area, without having obtained the necessary licence under the Act:—

Held, that s. 253 (supra) takes the place of the Town Police Clauses Act, 1847, s. 73, which enabled "any person" to recover penalties for offences against that Act, and therefore except in the case of information by a party aggrieved or the local authority for the district, the consent of the Attorney-General is now a condition precedent to proceedings for the recovery of penalties under the Town Police Clauses Act, 1847.

Parry v. *Croydon Commercial Gas and Coke Co.* (1862) 11 C. B. (N.S.) 579 followed.

Jobson v. *Henderson* (1900) 82 L. T. 260; 64 J. P. 425 not followed.

CASE stated by justices for the City of Sheffield.

At a court of summary jurisdiction sitting at Sheffield on November 13, 1928, an information was preferred by Arthur Kitson, the respondent, under the Town Police Clauses Acts, 1847 and 1889, against the Sheffield Corporation, the appellants, for that on October 19, 1928, they being the proprietors of a certain motor omnibus unlawfully did permit the same to be used as a hackney carriage plying for hire within the prescribed distance without having obtained a licence to ply for hire for such carriage. The justices convicted the appellants and fined them forty shillings. At the request of the appellants the justices stated this case for the opinion of the Court.

The following facts were stated in the case to have been proved or admitted at the hearing:—

The appellants were the Municipal Corporation of the City and County Borough of Sheffield, and the Council of that

City exercised all powers vested in the corporation by the Municipal Corporation Act, 1882, or otherwise. The appellants were the proprietors of a motor omnibus, in respect of which a road fund licence had been issued by the Sheffield "County Borough Council" pursuant to the Roads Act, 1920, and orders and regulations thereunder. The respondent preferred the information on behalf of a company known as Arthur Kitson, Ld., which also carried on a motor omnibus business in the City of Sheffield, and of which he was a director and shareholder. On October 19, 1928, the appellants' omnibus was plying and standing for hire by and used to carry passengers at separate fares in the said City, being an urban district. The Council of the City had not issued any licence to ply for hire in respect of that omnibus, pursuant to the provisions of the Town Police Clauses Acts, 1847 and 1889. The appellants had permitted the omnibus to be used as a hackney carriage plying for hire within the City without having obtained a licence for such carriage. The omnibus was not plying or standing for hire on any route for which Arthur Kitson, Ld., had applied for a licence to ply for hire, or on which they had in fact been running omnibuses, and was not in competition with any of the omnibuses of the company.

For the appellants it was contended that as the Town Police Clauses Acts, 1847 and 1889, with respect to hackney carriages, were incorporated with the Public Health Act, 1875, s. 253 of that Act applied (1), and accordingly that proceedings for the recovery of any penalty could not be taken by any person other than by a party aggrieved, or by the local authority, without the consent in writing of the Attorney-General, and that the respondent was not a party aggrieved, and had not obtained the sanction of the Attorney-General.

(1) The Public Health Act, 1875, s. 253, provides: "Proceedings for the recovery of any penalty under this Act shall not, except as in this Act is expressly provided, be had or taken by any person other than by a party aggrieved, or by the local authority of the district in which the offence is committed, without the consent in writing of the Attorney-General. Provided. . . . ."

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For the respondent it was contended that the Public Health Act, 1875, s. 253 (1), did not apply to prosecutions under the Town Police Clauses Acts, or alternatively, if it did apply, that the respondent, as the nominee of Arthur Kitson, Ld., omnibus proprietors, was a party aggrieved.

Hon. R. Stafford Cripps K.C. and *Paley Scott* for the appellants. The Town Police Clauses Act, 1847, consists of a series of groups of sections which may or may not be incorporated in subsequent local Acts, as provided by s. 5 of the Act. It is clear from the Public Health Act, 1875, s. 171, that only portions of the Act of 1847 are there incorporated. These include the provisions with respect to hackney carriages, ss. 37 to 68, but do not include those sections which deal with penalties for breach of those provisions and enable any person to take proceedings for their recovery. On the contrary, the Public Health Act, 1875, provides by s. 253 that except in the case of (*a*) a person aggrieved and (*b*) the local authority for the particular district, persons bringing proceedings for the recovery of penalties must have the consent of the Attorney-General. Neither the respondent Kitson nor the company here are parties aggrieved and, as they have not obtained the consent of the Attorney-General, these proceedings should have failed at the outset. In *Jobson* v. *Henderson* (2) the Court held in a parallel case that proceedings might be taken by any one. But there the respondent did not appear and attention was not directed to the Act of 1847, s. 5, as to incorporation, nor to the fact that in the Act of 1847 the provisions as to penalties were in a separate part of the Act. Moreover, that case is at variance with *Parry* v. *Croydon Commercial Gas and Coke Co.* (3), in which a provision of the Gasworks Clauses Act, 1847, limiting the recovery of penalties under the Act to persons injured, was held to repeal a section of an earlier Act which enabled the common informer to sue for their recovery. That case

(1) See note (1) ante, p. 323.
(2) 82 L. T. 260; 64 J. P. 425.
(3) (1863) 11 C. B. (N. S.) 579; (1863) 15 C. B. (N. S.) 568.

is an authority contrary to *Jobson* v. *Henderson* (1), which should not be followed, having regard to the reasons already given.

The respondent is not a "party aggrieved," because he cannot be identified with the limited company of which he is a director, nor has he any personal grievance in connection with the running of this motor omnibus. A shareholder cannot claim to be a person aggrieved merely because dividends of the company may be reduced. The meaning of a "party aggrieved" is considered and explained in *Robinson* v. *Currey*. (2)

G. H. B. Streatfeild for the respondent. The magistrates were right in convicting the appellants. Sect. 253 of the Public Health Act, 1875, does not apply to prosecutions under the Town Police Clauses Act, 1847. In *Jobson* v. *Henderson* (1) a police superintendent laid an information in respect of a nuisance under the Town Police Clauses Act, 1847, s. 28. No additional penalty was imposed for this by the Public Health Act, 1875, which incorporated the Town Police Clauses Act, 1847, s. 28, and it was held that s. 253 of the Act of 1875 did not prevent the police superintendent, who was not a "person aggrieved" or a "local authority," from taking proceedings. That case is directly in point here. In *Parry* v. *Croydon Commercial Gas and Coke Co.* (3) there was an express provision as to penalties in the Gasworks Clauses Act, 1847, which clearly ousted the corresponding provision in the local Act which preceded it. Here there is no section which ousts the validity of the Town Police Clauses Act, 1847, s. 73, and that section applies here, so that the consent of the Attorney-General is not necessary.

In any case, the respondent here represents the company of which he is a director and shareholder, and both he and the company are aggrieved by the competition from the unlicensed motor omnibus which is owned and operated by the appellants.

(1) 82 L. T. 260. (2) (1881) 7 Q. B. D. 465.
(3) 11 C. B. (N. S.) 579; 15 C. B. (N. S.) 568.

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LORD HEWART C.J. [after stating the facts continued:] This is a case stated by justices for the City of Sheffield. The question in dispute arises in the following way. On November 13, 1928, two informations were preferred by the town clerk of Sheffield against a company named Arthur Kitson, Ld., for unlawfully permitting a motor coach of which they were proprietors to be used as a hackney carriage plying for hire within the prescribed distance without having obtained a licence to ply for hire. Those informations were duly adjudicated upon, but on the same day Mr. Arthur Kitson, a director of Arthur Kitson, Ld., preferred an information against the Corporation of the City of Sheffield for that they on October 19, 1928, in Sheffield, being the proprietors of a motor omnibus, unlawfully did permit that motor omnibus to be used as a hackney carriage plying for hire within the prescribed distance without having obtained a licence to ply for hire for that carriage. The justices, having heard the evidence and the arguments, convicted the Corporation of Sheffield, and fined them 40*s*. The question for us is whether, in so deciding, the justices came to a correct decision in point of law. Apparently upon the facts there was no substantial dispute, and it is found as a fact, amongst other things, that the omnibus of the appellants was not plying or standing for hire on any route for which Arthur Kitson, Ld., had applied for a licence to ply for hire, or on which they had in fact been running omnibuses; it was not in competition with any of the omnibuses of the company.

The first question which arises on this case is: under what statute were these proceedings for the recovery of a penalty launched? Were they under the provisions of the Public Health Act, or were they under the provisions of the Town Police Clauses Act, 1847? Undoubtedly, the offence which was alleged against the appellants was an offence under the Town Police Clauses Act, 1847, s. 47, which provides that a person is liable to a penalty if he acts without a licence, or if, being a proprietor, he employs an unlicensed driver of a hackney carriage; and if the proceedings for

the recovery of the penalty had also been under the provisions of the Town Police Clauses Act, 1847, no doubt any person could have commenced such proceedings. But when one looks at this statute of 1847, its scheme is at once manifest and unusual. It consists of a series of chapters or groups of sections, one with respect to one topic, as, for example, "Constables"; another with respect to obstructions and nuisances, and so forth; each group or fasciculus of groups being prefaced with the words "and with respect to" so and so, "be it enacted as follows." When one comes to the topic of recovering damages and penalties, that topic is made the subject of a wholly separate group or part of the Act, prefaced with the words "and with respect to the recovery of damages not specially provided for, and of penalties, and to the determination of any other matter referred to justices, be it enacted as follows." But the provisions of the Town Police Clauses Act, which is a collection of model clauses, have no effect except in so far as they are incorporated in other statutes; and when one comes to the Public Health Act, 1875, it is quite clear from s. 171 that it is by no means the whole of the Town Police Clauses Act, 1847, which is incorporated. On the contrary, what is incorporated is a series of groups of sections described in language borrowed from the Town Police Clauses Act, of which the fourth group in the enumeration is: "with respect to hackney carriages." The section does not incorporate, on the contrary it may be thought pointedly to omit, that part of the Town Police Clauses Act of 1847 which is concerned with the recovery of penalties. Why is that part omitted? Is not the answer this: that by s. 253 of the Public Health Act, 1875, there is a somewhat elaborate provision for the recovery of penalties, containing certain specific restrictions wholly inconsistent with the comprehensiveness and freedom of the remedy permitted under the Town Police Clauses Act. Sect. 253 of the Public Health Act provides: "Proceedings for the recovery of any penalty under this Act shall not, except as in this Act is expressly provided, be had or taken by any person other than by a party aggrieved, or by the local authority of the district

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in which the offence is committed, without the consent in writing of the Attorney-General." It is quite true that what is spoken of is a penalty under this Act; but that phrase of course also covers a penalty under this Act, as extended by the clauses or sections from other Acts incorporated in this Act. In other words, s. 253 provides that, except in the case of a person aggrieved, or in the case of the local authority of a district, there cannot be proceedings for the recovery of a penalty without the written consent of the Attorney-General. It was said, and very properly said, by counsel in opening this case for the appellants, that upon the question whether the proceedings were really under s. 253 of the Public Health Act, or under s. 73 of the Town Police Clauses Act of 1847, there was a decided case which was apparently against him. That was the case of *Jobson* v. *Henderson.* (1) That case arose under s. 28 of the Town Police Clauses Act, 1847, with reference to the throwing of stones to the annoyance and danger of passengers; and the question was whether the district superintendent of police could lay an information although he was not the party aggrieved, nor was he authorized by the local authority. The justices held that he could not, and there was an appeal, at which unfortunately the respondent did not appear, with the result that the argument before this Court was all on one side. It was there argued for the appellant in that case that the Public Health Act, 1875, s. 171, incorporated the provisions of the Act which imposed the penalty; and undoubtedly the Court, upon the materials which were then before it, came to that conclusion under the Town Police Clauses Act, and, said Channell J., with whom Bucknill J. agreed: "Under the Towns Police Clauses Act proceedings might be taken by anyone, and the Public Health Act, 1875 incorporates the Towns Police Clauses Act, 1847 to a certain extent by s. 171." It is clear that if the respondent had appeared, the question to what extent the Town Police Clauses Act was incorporated in the Public Health Act would have been more fully examined. It is said with

(1) 82 L. T. 260.

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regard to that case to-day that the respondents did not appear and that attention was not directed to the Act of 1847, s. 5, as to incorporation in part, nor to the circumstance that under the scheme of the 1847 Act the section relating to penalties was in a wholly separate portion of the Act. Moreover, that case, and relevant cases upon the interpretation of statutes, were not so much as mentioned, and finally, an earlier case, which was said to be in point, was not at all referred to. That earlier case was *Parry* v. *Croydon Commercial Gas and Coke Co.* (1), decided by Erle C.J., Willes and Williams JJ. That case no doubt had to deal with a different statute, but it seems to me that the argument and the decision in that case have a very direct bearing upon the kind of matter which was raised in the case of *Jobson* v. *Henderson* (2) and is raised again to-day. It is of course no light matter for this Court to take a different view from a view which appears to have been taken in a similar case by this Court. But when one observes the criticisms which have been made upon *Jobson* v. *Henderson* (2), and not least the fact that there was no argument on the part of the respondent in that case, I think that we are warranted in coming to the conclusion that the proceedings with which we are now concerned must, if they are to be sustainable, be brought under s. 253 of the Public Health Act, 1875. I cannot conceive that the limited remedy provided by the Public Health Act, 1875, s. 253, could co-exist with the unrestricted remedy provided by the Town Police Clauses Act, 1847, s. 73. It appears to me, therefore, that it had to be shown that Mr. Kitson, who laid this information, was a party aggrieved, inasmuch as he was not the local authority and had not the written consent of the Attorney-General.

It was undoubtedly urged, not indeed primarily, but in the alternative, in the Court below, that Mr. Kitson was a party aggrieved. It was also alleged arguendo (there was no evidence about it) that he was the nominee of the company; and the justices accepted that and all the other

(1) 11 C. B. (N. S.) 579. (2) 82 L. T. 260.

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submissions on the part of the respondent. But is it true to say Mr. Kitson either individually, or even if he be regarded as the agent, nominee or representative of the company, was a party aggrieved? I can see no materials upon which the proposition could be supported. Here was a route with which the company, Arthur Kitson, Ld., had no concern. The statute provided that upon certain routes, of which this route was one, the Corporation of Sheffield might provide and run motor omnibuses. The grievance, if grievance there could be, to the company and to Mr. Kitson, as perhaps commercial rivals of the corporation in this matter, could not possibly be that the omnibuses of the corporation were being run unlicensed, but that the omnibuses of the corporation were in fact being run. The grievance to the company and the director would be just the same whether the vehicles upon this non-competing route were or were not licensed. There are other questions which might arise, subsidiary questions upon the point: whether it was true to say that as a director or as a shareholder, Mr. Arthur Kitson himself was an aggrieved person; I do not think it necessary to enter upon that question, because it seems to me there were no materials here upon which the justices could properly hold that even the limited company was aggrieved by the omission to have these motor buses or this motor bus licensed. It seems to me, therefore, that these proceedings ought to have failed upon the threshold, for the reason that the information was laid by a person who under the statute had no authority to lay it.

Holding that view, I do not propose to enter upon this interesting inquiry, whether upon the true construction of the Sheffield Corporation Consolidation Act, 1918, contrasted and compared with certain provisions of the Town Police Clauses Act, it was necessary that motor buses upon these prescribed routes should be licensed at all. There is much to be said on both sides of that interesting and possibly important question. I refrain from entering upon it, because it does not seem to me that a decision upon that point is necessary to the decision of this case. For these reasons,

and in these circumstances, it seems to me that these appellants ought to succeed and this appeal ought to be allowed.

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AVORY J. I agree, and concur in all the reasons given by my Lord.

SWIFT J. I agree.

Solicitors for appellants: *Rollit, Sons & Haydon, for Sir William Hart, Town Clerk, Sheffield.*

Solicitors for respondent: *Doyle, Devonshire & Co., for W. I. Mitchell, Sheffield.*

F. P. F.

CASSIDY *v.* DAILY MIRROR NEWSPAPERS, LIMITED.

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April 17, 18; *May* 13.

[1928. C. 1819.]

Defamation—Libel—Statement not ex facie defamatory—Extraneous Facts—Knowledge of Publisher—Husband and Wife—Announcement of Betrothal.

The defendants published in a newspaper a photograph of one M. C. and a Miss X together with the words "Mr. M. C., the race horse owner, and Miss X, whose engagement has been announced." The plaintiff was, and was known among her acquaintance as, the lawful wife of M. C.; but the defendants did not know this:—

Held, by Scrutton and Russell L.JJ. (Greer L.J. dissenting), that the publication was capable of conveying a meaning defamatory of the plaintiff and, the jury having found that it conveyed to reasonably minded people an aspersion on her moral character, that she was entitled to damages.

Dictum of Brett L.J. in *Capital and Counties Bank* v. *Henty* (1880) 5 C. P. D. 539, 540, that, where it is sought by reason of extrinsic facts to give a defamatory meaning to a statement ex facie innocent, those facts must be known to the person publishing the statement, dissented from.

Judgment of McCardie J. affirmed.

APPEAL from the judgment of McCardie J. in an action tried before the learned judge and a common jury.

The plaintiff, Mrs. Mildred Anna Cassidy, was and was generally known as the lawful wife of one Kettering Edward

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Cassidy, who was also known as Michael Dennis Corrigan, an owner of race horses and at one time reputed to be a General in the Mexican Army. The plaintiff and her husband did not live together, but he was in the habit of visiting her at the shop where she was employed. She brought an action for libel against the defendants alleging that on February 21, 1928, they had printed and published in the Daily Mirror newspaper a photograph of the said K. E. Cassidy and a woman whose name was not mentioned at the trial, but who was referred to as Miss X, under a heading "To-day's gossip. News and views about men, women and affairs in general." Under the photograph were the words: "Mr. M. Corrigan, the race horse owner, and Miss" X, "whose engagement has been announced."

The plaintiff alleged that she had suffered damage through the above publication inasmuch as it was intended, and by several people understood, to mean that the said K. E. Cassidy was not the plaintiff's husband but was living with her in immoral cohabitation. The defendants denied that the publication bore, or was intended to bear, or was capable of bearing, the meaning ascribed to it by the plaintiff, and denied that it was capable of any defamatory meaning; and they further pleaded that the matter and words in their natural and ordinary significance were true in substance and in fact. They did not admit that the plaintiff was the wife of K. E. Cassidy, and still abstained from admitting this after the plaintiff had made discovery of documents including the certificate of her marriage with the said K. E. Cassidy.

At the trial the plaintiff called three of her acquaintance who had held her in respect and treated her as a friend, but who on seeing the publication thought that she had been deceiving them, masquerading as Cassidy's wife while cohabiting with him as his mistress. The defendants called evidence to the effect that on February 18, 1928, at Hurst Park races one Stanley Ernest King Richardson, a partner in the News Illustrations Press Agency, saw K. E. Cassidy in company with Miss X, whose photograph he had taken on a former occasion; that Cassidy told him that he was

engaged to Miss X; that Richardson asked if he might publish the photograph he had taken and the news of the engagement; that Cassidy said yes, but that he did not like the photograph that had been taken; and added "You can take another now. The lady is here. I will give you her name and you can announce the engagement"; that Cassidy then called to Miss X, and the photograph was taken, and Cassidy gave the name of Miss X in full in her presence and apparently in her hearing; that Richardson then sent to the defendants for publication a print of the photograph together with the words complained of, or words to the same effect, and that the defendants thereupon published the same.

On the day on which the publication appeared the plaintiff complained of it, and received a letter signed on behalf of the defendants' "gossip editor" explaining that the photograph was taken at Hurst Park by the News Illustrations Press Agency of Fleet Street. "They say," it continued, "that their regular racing photographer, who knows Mr. M. Corrigan, took the picture and received from him information about the alleged engagement." The plaintiff then consulted her solicitors, who wrote to the defendants complaining of the libel and asking for an explanation. They received a reply dated February 28, 1928, in which, after expressing regret for any annoyance caused by the publication, the defendants' solicitors said: "We think, however, that there must be some mistake or misapprehension, as when Mr. Corrigan and Miss" X "posed for this photograph he informed the photographer as to Miss" X's "engagement and he expressly authorized him to publish it with the announcement of this engagement. Our clients received it in the ordinary course of business and published it in all good faith." . . . .

The learned judge held that in the circumstances the publication was capable of conveying a meaning defamatory of the plaintiff. He directed the jury that if the publication reasonably conveyed to reasonably minded people who knew the circumstances an aspersion on the moral character of the

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plaintiff their verdict should be for the plaintiff; but if it did not do so their verdict should be for the defendants. If their verdict was for the plaintiff they should say what damages they thought proper in all the circumstances of the case, among which was the fact that the plaintiff had brought actions against two other newspapers and had recovered 37*l.* 10*s.* against each of them. The jury returned a verdict for the plaintiff for 500*l.*

The defendants appealed.

Jowitt K.C., *Conway K.C.* and *Blanco White* for the appellants. The learned judge was wrong in holding that the publication complained of was capable of being defamatory of the plaintiff. Her name is not mentioned in it and it contains no allusion to her whatever. Only when the extraneous fact of Cassidy's marriage was known would the publication suggest any thought of the plaintiff to any one. That fact was not known to the appellants. There is surely nothing defamatory on the face of a statement that a man and a woman are engaged to be married. No doubt a publication innocent upon its face may take a defamatory colour in the light of extraneous facts when known; but in order to make it actionable those facts must be known, not only to the persons who attribute a defamatory meaning to it, but to the person who publishes it as well: *Capital and Counties Bank* v. *Henty* (1), per Brett L.J. Lord Blackburn expressed the same view on the hearing of the appeal to the House of Lords in that case (2) when, as a reason for not holding the defendants responsible for the meaning placed on the circular they sent out, he said there was no evidence "that Messrs. Henty knew that there was such a failure as that of the West of England Bank impending."

Even if the appellants had known that Cassidy was a married man, to state that he is engaged to be married is not defamatory of his wife. He might have had in view a dissolution of his marriage, or he might have made a promise of marriage which

(1) 5 C. P. D. 514, 539. The passage relied on is set out in the judgment of Greer L.J., p. 346 post.

(2) (1882) 7 App. Cas. 741, 785.

he could not lawfully perform. Where statements require an innuendo to make them defamatory the test, as Lord Shaw said in *Stubbs, Ld.* v. *Russell* (1), is this: "Is the meaning sought to be attributed to the language alleged to be libellous one which is a reasonable, natural, or necessary interpretation of its terms? It is productive . . . . of much error and mischief to make the test simply whether some people would put such and such a meaning upon the words, however strained or unlikely that construction may be." Each of the witnesses called for the plaintiff had known her for several years and each of them professed their respect and admiration for her character and disapproval of the conduct of her husband. It was unnatural and unreasonable conduct in these persons when they saw this publication straightway to rush to the conclusion that the plaintiff had all along been leading an immoral life. It is not enough for the appellant to say that by some person or another the words might be understood in a defamatory sense: *Nevill* v. *Fine Art and General Insurance Co.* (2), per Lord Halsbury L.C. It is unreasonable that, when there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the statement: *Capital and Counties Bank* v. *Henty* (3), per Brett L.J., and Lord Watson's words to the same effect in the appeal to the House of Lords. (4) In *Wood* v. *Edinburgh Evening News* (5) an advertisement that a wet nurse was wanted at the residence of the plaintiffs, who had only been five months married, was held to convey no meaning defamatory of the plaintiffs. There is no case to be found in the books of a statement, innocent on its face and made in all innocence, being held to be libellous unless there has been some negligence on the part of the person making it. Such authority as exists is to the contrary: *Emmens* v. *Pottle* (6); *Vizetelly* v. *Mudie's Select Library, Ld.* (7) The respondents rely on *E. Hulton & Co.* v. *Jones* (8),

(1) [1913] A. C. 386, 398.
(2) [1897] A. C. 68, 73.
(3) 5 C. P. D. 514, 541.
(4) 7 App. Cas. 741, 788.
(5) 1910 S. C. 895.
(6) (1885) 16 Q. B. D. 354.
(7) [1900] 2 Q. B. 170.
(8) [1910] A. C. 20.

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but there the publication was not on the face of it innocent; the intention to defame was clear, though the writer did not intend to defame the plaintiff personally.

A. M. Sullivan K.C. and *Martin O'Connor* for the respondent. The argument for the appellants was exactly that which was advanced in *Morrison* v. *Ritchie* (1) and rejected by the Court of Session. In that case the defenders published a notice that on a certain date the wife of G. M., giving his address, had been delivered of twin sons. At the date mentioned in the notice G. M. and his wife had been married little more than a month. They brought an action for libel and the Court of Session held that the action was relevant. The learned judge was right in holding that in the circumstances the publication in the present case was capable of a meaning defamatory of the plaintiff. Few persons, other than lawyers, on reading that the engagement of Mr. M. Corrigan, the race horse owner, and Miss X had been announced, would stop to consider that possibly Mr. M. Corrigan might be anticipating the dissolution of his marriage, or that possibly he had made a promise to Miss X which he could not lawfully perform. The overwhelming majority of persons would understand that Mr. M. Corrigan was a bachelor. In fact the publication is tantamount to stating that Cassidy or Corrigan, the bachelor race horse owner, is engaged to be married to Miss X. Now to state of and concerning a married man that he is a bachelor is to defame him; because marriage is a status recognized as conferring certain privileges and imposing certain responsibilities which are not accorded or attributed to single persons. Moreover thus to defame the husband is to defame his wife also, for in this respect husband and wife are still one person in the eye of the law, as they were for most purposes at common law, until first the Court of Chancery and then the Legislature separated them for certain purposes. The question whether the person so defaming husband and wife knew of their status, is absolutely immaterial. "Libel is a tortious act," said Lord Loreburn L.C. in *E. Hulton & Co.* v. *Jones.* (2)

(1) (1902) 4 F. 645.

(2) [1910] A. C. 20, 23.

"What does the tort consist in? It consists in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it. A person charged with libel cannot defend himself by showing that he intended in his own breast not to defame, or that he intended not to defame the plaintiff, if in fact he did both." If the passage relied on by the appellants from the judgment of Brett L.J. in *Capital and Counties Bank* v. *Henty* (1) was law in the year 1880 it ceased to be law upon the decision of *E. Hulton & Co.* v. *Jones.* (2) It cannot be denied that if the appellants had published the statement "K. E. Cassidy has no wife" that would have been a libel not only of Cassidy's wife but of Cassidy himself. What they have done is to say the same thing in other words. [*Stubbs, Ld.* v. *Mazure* (3) was also cited.]

Conway K.C. in reply.

Cur. adv. vult.

May 13. The following written judgments were delivered :—

SCRUTTON L.J. The facts in this case are simple. A man named Cassidy, who for some reason also called himself Corrigan and described himself as a General in the Mexican Army, was married to a lady who also called herself Mrs. Cassidy or Mrs. Corrigan. Her husband occasionally came and stayed with her at her flat, and her acquaintances met him. Cassidy achieved some notoriety in racing circles and in indiscriminate relations with women, and at a race meeting he posed, in company with a lady, to a racing photographer, to whom he said he was engaged to marry the lady and the photographer might announce it. The photographer, without any further inquiry, sent the photograph to the Daily Mirror with an inscription: "Mr. M. Corrigan, the race horse owner, and Miss X"—I omit the name—"whose engagement has been announced," and the Daily Mirror published the photograph and inscription. This paper was read by the female acquaintances of

(1) 5 C. P. D. 514, 539. (2) [1910] A. C. 20.
(3) [1920] A. C. 66.

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Mrs. Cassidy or Mrs. Corrigan, who gave evidence that they understood from it that that lady was not married to Mr. M. Corrigan and had no legal right to take his name, and that they formed a bad opinion of her in consequence. Mrs. Cassidy accordingly brought an action for libel against the newspaper setting out these words with an innuendo, meaning thereby that the plaintiff was an immoral woman who had cohabited with Corrigan without being married to him.

At the trial counsel for the defendants objected that the words were not capable of a defamatory meaning. McCardie J. held that they were; the jury found that they did reasonably bear a defamatory meaning and awarded the plaintiff 500*l.* damages. The damages were high, but the plaintiff called considerable evidence of damage to social reputation, and the defendants' solicitors suggested, when the plaintiff alleged she was married to Mr. Corrigan, that there must be some mistake; and even after she had produced her marriage certificate, did not admit the marriage. It is not possible to interfere with the damages, and some allegations of misdirection and wrongful admission of evidence came to nothing.

The real questions involved were: (1.) Was the alleged libel capable of a defamatory meaning? (2.) As the defendants did not know the facts which caused the friends of Mrs. Cassidy to whom they published the words to draw defamatory inferences from them about the plaintiff, were they liable for those inferences?

Now the alleged libel does not mention the plaintiff, but I think it is clear that words published about A may indirectly be defamatory of B. For instance, "A is illegitimate." To persons who know the parents those words may be defamatory of the parents. Or again, "A has given way to drink; it is unfortunately hereditary"; to persons who know A's parents these words may be defamatory. Or "A holds a D. Litt. degree of the University at X, the only one awarded." To persons who know B, who habitually describes himself (and rightly so) as "D. Litt. of X," these

words may be capable of a defamatory meaning. Similarly, to say that A is a single man or a bachelor may be capable of a defamatory meaning if published to persons who know a lady who passes as Mrs. A and whom A visits. As Lord Blackburn says in *Henty's* case (1): "There are no words so plain that they may not be published with reference to such circumstances, and to such persons knowing these circumstances, as to convey a meaning very different from that which would be understood from the same words used under different circumstances," or, as Cotton L.J. said in the same case in the Court of Appeal (2): "One must consider, not what the words are, but what conclusion could reasonably be drawn from it, as a man who issues such a document is answerable not only for the terms of it but also for the conclusion and meaning which persons will reasonably draw from and put upon the document." It was argued that the words were not capable of the meaning that Corrigan was a single man, for they might mean that Corrigan was intending to seduce a woman under promise of marriage, or that he was divorced and could marry. On this I would remark that it would be so unusual for a seducer publicly to make his untrue representations, that the jury might well reject this meaning. Also, that I do not agree with some dicta to the effect that if words are capable of several meanings, some defamatory and some innocent, they should not be left to the jury. I agree with the view expressed arguendo by Sir Montague Smith in the case of *Simmons* v. *Mitchell* (3): "The judge must decide if the words are reasonably capable of two meanings; if he so decide, the jury must determine which of the two meanings was intended;" and by "intended" I understand that a man is liable for the reasonable inferences to be drawn from the words he used, whether he foresaw them or not, and that if he scatters two-edged and ambiguous statements broadcast, without knowing or making inquiry about facts material to the statements he makes and the inferences which may be drawn from them, he must be liable

(1) 7 App. Cas. 741, 771. (2) 5 C. P. D. 514, 536.
(3) (1880) 6 App. Cas. 156, 158.

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to persons who, knowing those facts, draw reasonable inferences from the words he publishes. As Lord Herschell L.C. says in the case of the *Australian Newspaper Co.* v. *Bennett* (1): "It is not disputed that, whilst it is for the Court to determine whether the words used are capable of the meaning alleged in the innuendo, it is for the jury to determine whether that meaning was properly attached to them. It was therefore the province of the jury in the present case to determine whether the words used were written of the plaintiff, and whether they bore the defamatory sense alleged."

In my view the words published were capable of the meaning "Corrigan is a single man," and were published to people who knew the plaintiff professed to be married to Corrigan; it was for the jury to say whether those people could reasonably draw the inference that the so-called Mrs. Corrigan was in fact living in immoral cohabitation with Corrigan, and I do not think their finding should be interfered with.

But the second point taken was that the defendants could not be liable for the inference drawn, because they did not know the facts which enabled some persons to whom the libel was published, to draw an inference defamatory of the plaintiff. This was rested on some dicta of Brett L.J. in *Henty's* case (2), that the evidence which made apparently innocent statements defamatory must be, "known both to the person who wrote the document and to the persons to whom it was published." This, I think, was originally obiter, and, since the decision in *E. Hulton & Co.* v. *Jones* (3), is no longer law. The statement in the judgment of Farwell L.J. (4) in that case is: "The rule is well settled that the true intention of the writer of any document, whether it be contract, will, or libel, is that which is apparent from the natural and ordinary interpretation of the written words; and this, when applied to the description of an individual, means the interpretation that would be reasonably put upon those words by persons who know the plaintiff and the

(1) [1894] A. C. 284, 287.
(2) 5 C. P. D. 539, 540.
(3) [1910] A. C. 20.
(4) [1909] 2 K. B. 444, 478.

circumstances." The whole of the passage in that judgment on pp. 478 and 479 is worthy of attention. This judgment was approved by Lord Gorell and Lord Atkinson in the House of Lords, and supported by Lord Shaw (1), who says: "My Lords, I demur to the observation so frequently made in the argument that these principles are novel. Sufficient expression is given to the same principles by Abbott C.J. in *Bourke* v. *Warren* (2) .... in which that learned judge says: 'The question for your consideration is whether you think the libel designates the plaintiff in such a way as to let those who knew him understand that he was the person meant. It is not necessary that all the world should understand the libel; it is sufficient if those who know the plaintiff can make out that he is the person meant.' I think it is out of the question to suggest that that means 'meant in the mind of the writer' or of the publisher; it must mean 'meant by the words employed.' The late Lord Chief Justice Coleridge dealt similarly with the point in *Gibson* v. *Evans* (3) when in the course of the argument he remarked: 'It does not signify what the writer meant. The question is whether the alleged libel was so published by the defendant that the world would apply it to the plaintiff.'" In my view, since *E. Hulton & Co.* v. *Jones* (4), it is impossible for the person publishing a statement which, to those who know certain facts, is capable of a defamatory meaning in regard to A, to defend himself by saying: "I never heard of A and did not mean to injure him." If he publishes words reasonably capable of being read as relating directly or indirectly to A and, to those who know the facts about A, capable of a defamatory meaning, he must take the consequences of the defamatory inferences reasonably drawn from his words.

It is said that this decision would seriously interfere with the reasonable conduct of newspapers. I do not agree. If publishers of newspapers, who have no more rights than private persons, publish statements which may be defamatory of other people, without inquiry as to their truth, in order

(1) [1910] A. C. 25, 26.
(2) (1826) 2 C. & P. 307, 309.
(3) (1889) 23 Q. B. D. 384, 386.
(4) [1910] A. C. 20.

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to make their paper attractive, they must take the consequences, if on subsequent inquiry, their statements are found to be untrue or capable of defamatory and unjustifiable inferences. No one could contend that "M. Corrigan, General in the Mexican Army," was "a source in whom we have full confidence." To publish statements first and inquire into their truth afterwards, may seem attractive and up to date. Only to publish after inquiry may be slow, but at any rate it would lead to accuracy and reliability.

In my opinion the appeal should be dismissed with costs.

GREER L.J. The plaintiff, Mrs. Mildred Anna Cassidy, the wife of Kettering Edward Cassidy, otherwise known as Michael Corrigan, brought this action to recover damages in respect of a picture and certain words appearing thereunder in an issue of the defendants' newspaper, the Daily Mirror, dated February 21, 1928. The picture consisted of a portrait of the plaintiff's husband and a lady, and underneath these words were printed: "Mr. M. Corrigan, the racehorse owner, and Miss" X, "whose engagement has been announced." Both the picture and the words are in themselves unobjectionable. They contain in their ordinary signification no defamatory statement about anybody, and it was necessary for the success of the plaintiff in the action that she should establish by innuendo that by the picture and the words the defendants said something which was defamatory of her. She therefore pleaded in para. 4 of her statement of claim that by the said words the defendants meant and intended and were understood to mean that the said Kettering Edward Cassidy, otherwise known as M. Corrigan, that is to say the plaintiff's husband, had become engaged to be married to the said Miss X. So far the innuendo merely stated the ordinary meaning of the words in the alleged libel, but the innuendo went on to allege an extended meaning, to the effect that the said Kettering Edward Cassidy, otherwise known as M. Corrigan, was not a man bound in lawful wedlock to the plaintiff, and that the plaintiff was not lawfully married

to her husband, and that the plaintiff was living in adultery with him, and that she was a dissolute and immoral woman, and was a despicable person who had imposed upon her friends and acquaintances, and upon such members of the public as knew her, by pretending to be a respectable married woman, whereas she had been living in concubinage with the said Kettering Edward Cassidy, otherwise known as M. Corrigan, for many years.

In order to succeed in her action the plaintiff was bound to show that, reasonably interpreted, the words used in the newspaper were intended to convey the meaning set out in the innuendo, the intention being judged not by what was in the mind of the writer, but what appears from the words he has used. In my judgment it was not enough for her to show that people who knew her jumped to the conclusion that she was living with Corrigan as his mistress. She was bound to show that, reasonably interpreted, the words of the alleged libel contained an allegation to that effect. She called as her witnesses three ladies who knew her as the wife of Cassidy and knew that her husband was the man who owned racehorses under the name of Corrigan. Each of these ladies knew that her husband, as they admitted in their evidence, was a blackguard who had treated her badly and had been unfaithful to her. They knew that she was living apart from Cassidy, but had seen him on several occasions visiting the shop where she was employed, and when they saw the paragraph in the Daily Mirror they appear to have jumped to the conclusion that she was a dishonest woman who had been deceiving them and had been living in concubinage with the scoundrel who occasionally visited her at the shop where she was employed. None of these ladies said that, reading the words of the alleged libel, they came to the conclusion that the reasonable meaning to be attributed to them was that Corrigan was not the plaintiff's husband. The learned judge left the case to the jury, and the jury found a verdict for the plaintiff for 500*l.* damages. The defendants appeal, and this Court is asked to say that the judge ought to have decided that there was no case to go to

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the jury, because the words in their ordinary meaning are not defamatory of the plaintiff and, reasonably interpreted, they do not contain any such defamatory statements as are attributed to them by the innuendo.

In my judgment this appeal ought to succeed. I think so for two reasons. First, it is not sufficient to establish liability for a witness to prove that by reason of some fact to which the libel refers he draws an unfavourable inference against the plaintiff. That is not sufficient to justify a verdict that the words in question are libellous. The jury must be satisfied by evidence that, on a reasonable interpretation of the words used, the innuendo is proved to be an implicit part of the statement made by the defendants. In *Nevill* v. *Fine Art and General Insurance Co.* (1) Lord Halsbury uses these words: "It stands, therefore, as it appears to me, a long way distant from what was done in *Henty's* case (2), where a communication was made to the persons who had to make payments to the brewer in the particular case, and they were informed that the cheques of such and such a bank were not to be received in future. That undoubtedly, as Lord Watson points out, might possibly by some persons have been understood to convey some reflection upon the solvency of the particular bank upon which the cheques were drawn, but because some persons may choose, not by reason of the language itself, but by reason of some fact to which it refers, to draw an unfavourable inference, it does not follow that therefore such matter is libellous." Those observations appear to me to apply to the present case. The language of the alleged libel refers to the fact of the announcement of Mr. Corrigan's engagement, and some persons, that is to say the ladies who gave evidence, have chosen, not by reason of the language of the alleged libel, but by reason of a fact to which it refers, to draw an unfavourable inference against Mrs. Corrigan; but none of the three has stated that she interpreted the words as containing an allegation that Mrs. Corrigan was not the wife of Corrigan, and if they had done so I should myself

(1) [1897] A. C. 68, 73. (2) 7 App. Cas. 741.

have come to the conclusion that they put upon the words an interpretation which they could not reasonably bear.

It has been suggested that if several inferences may be drawn by the persons to whom the alleged libel is published, and one of them is injurious to the reputation of the plaintiff, the one injurious imputation may reasonably be inferred to be the meaning of the words, and the case should be left to the jury. In my judgment this view is not in accord with the decision of the majority of the House of Lords in *Henty's* case. (1) Lord Selborne says (2): "In deciding on the question whether the words are capable of that meaning"—that is, the meaning stated in the innuendo—"he ought not, in my opinion, to take into account any mere conjectures which a person reading the document might possibly form, as to some out of various motives or reasons which might have actuated the writer, unless there is something in the document itself, or in other facts properly in evidence, which to a reasonable mind would suggest, as implied in the publication, those particular motives or reasons." This I take to mean that where there are several possible explanations of the words used, one only of which is defamatory, it is not open to the jury to find that to be the meaning of the words, unless there is something in the documents or facts properly in evidence that would make it reasonable to attribute to the words a defamatory meaning. Lord Watson says (3): "But, besides the one injurious inference suggested by the appellants, there are many other inferences of an innocent character, which naturally might, and probably would, suggest themselves to any reader of the circular who was not induced to put a malignant construction upon it by some cause such as is not proved to have existed in the case of any one of the persons to whom it was sent." Lord Bramwell says (4): "I will suppose I am wrong in thinking no inference of insolvency can be drawn from the circular, and will now deal with the third, viz., that the inference to be drawn from the circular was that the defendants, for some

(1) 7 App. Cas. 741.
(2) 7 App. Cas. 744.
(3) 7 App. Cas. 788.
(4) 7 App. Cas. 792.

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reason or reasons, of which the insolvency of the plaintiffs *might* be one, would not take in payment cheques on the plaintiffs' branches. Is that actionable? I think not. The question seems to me one of entire novelty, strange as it may be that such a question should now arise for the first time. I cannot think that an action lies in such a case. I think that the defamer is he who, of many inferences, chooses a defamatory one."

The other reason why I think the decision of the learned judge was wrong is that in my view, notwithstanding the case of *E. Hulton & Co.* v. *Jones* (1), the law still is as it was laid down by Brett L.J. in *Henty's* case. (2) If extrinsic facts are relied upon for the purpose of converting that which would otherwise be an innocent statement of fact into a defamatory libel, the extrinsic facts must be known both to the person who framed the alleged libel and to the persons to whom it was published. In this case I take it as common ground that those who were responsible for the publication of the photograph and the words in question did not know that Corrigan was a married man. In the report of the decision of the Court of Appeal in *Capital and Counties Bank* v. *Henty* (3) Lord Esher, then Brett L.J., uses these words: "The first question for the jury is whether the document would be read in a defamatory sense by persons of ordinary reason in the position of those to whom it is published. If, in the opinion of the jury, it would not be so read according to the prima facie meaning of the language, then there is a further question (if there is any evidence upon which it can be raised) whether there were facts known both to the person who framed the alleged libel, and to the persons to whom it was published, which would lead the latter reasonably to put upon the document the construction that, having a secondary defamatory sense, it was issued ironically or otherwise than in the primary sense of the language. With regard to the second proposition, I think it is necessary that the facts should be known both to the person who indites the libel and to the persons to

(1) [1910] A. C. 20.
(2) 5 C. P. D. 514.
(3) 5 C. P. D. 539.

whom it is published, because if facts are known to the latter persons from which they might reasonably suppose that the document is defamatory, but those facts are not known to the person who wrote it, if he were held liable he would be made liable for doing that which by the hypothesis he could have no reason to suppose would injure anybody, the language used being such as in its ordinary sense would not be defamatory of anybody."

I cannot find in the speeches of the majority of the Lords who decided this case in the House of Lords (1) any dissent from the view expressed in the Court of Appeal by Brett L.J., though they deal with the case from a slightly different angle, but in the course of his speech Lord Blackburn seems to me to use words which indicate that he agreed with the opinion expressed by Brett L.J. He says (2): "Independently of all questions as to privilege, the manner of the publication, and the things relative to which the words are published, and which the person publishing knew, or ought to have known, would influence those to whom it was published in putting a meaning on the words, are all material in determining whether the writing is calculated to convey a libellous imputation." He uses words slightly different from those of Brett L.J., "which the person publishing knew, or ought to have known," and I think one must apply the words of Brett L.J. in the sense of that which they "knew or ought to have known." If it could be said in this case that those responsible for the publication in question knew or ought to have known that Corrigan was a man who had a wife living at the time, or was a man with whom there was a lady living and claiming to be his wife, it may be that the question whether the words were or were not defamatory ought to have been left to the jury; but there was no evidence from which it is reasonable to conclude that they knew or ought to have known that he was a married man. They were surely entitled to suppose that, as he said he was engaged to marry the lady in question, he was not in fact a married man, unless they knew to the contrary.

(1) 7 App. Cas. 741. (2) 7 App. Cas. 771.

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One or two illustrations may be given which indicate the danger of carrying the law of libel as far as it is argued in this case it should be carried. It is written of A.B. that he is ill-mannered and uneducated. It turns out, though the writer did not know it, that A.B. was in fact brought up by his uncle. Could it be said that the uncle could succeed in an action alleging that the words meant that he had badly brought up and educated A.B. ? A writer might state that A.B. is an ignoramus. Unknown to the writer, A.B. may have spent five years under the tuition of X.Y. at Eton. Could X.Y. allege that this was a libel upon him, the writer having been ignorant, and having no reason to suppose, that A.B. had been at Eton ? Take another case. A being under the mistaken impression that he saw Mr. B walking away from a theatre with Miss C, says next morning to an acquaintance: "I saw B and C leaving the theatre together last night." Unknown to A, but to the knowledge of his acquaintance, C had been murdered by the man with whom she left the theatre. Could A be successfully sued by B for saying he had murdered C ? If the case against the present defendants was rightly left to the jury, A could be so sued. To me it seems quite certain that it would be the duty of the judge to rule that the words were incapable of being so interpreted.

The decision of the House of Lords in *E. Hulton & Co.* v. *Jones* (1), which was very much relied upon by the respondents, does not, in my opinion, afford sufficient authority for deciding the present case in favour of the plaintiff. In that case the words complained of appeared in form to relate to an existing individual who was named. The words, if applied to an existing person, were clearly defamatory, and the House of Lords, affirming the Court of Appeal, held that the mere fact that the writer did not intend to injure the plaintiff afforded no defence to the action. It seems clear that the writer took the risk of making defamatory statements about an individual by name when he ought to have known that it was possible that there might be a person bearing that name

(1) [1910] A. C. 20.

who would be understood to be meant by the words which were used. Lord Loreburn in giving judgment pointed out that a person charged with libel cannot defend himself by showing that he intended in his own breast not to defame, or that he intended not to defame the plaintiff, if in fact he did both, and that his remedy was to abstain from using defamatory words. In the present case no defamatory words were used about anybody, and the defendants are, in my judgment, entitled to succeed, not because in his own mind the writer did not intend to defame, but because in fact he has not used language which reasonable persons either have or could have interpreted as defamatory of the plaintiff. As Farwell L.J. pointed out in the Court of Appeal (1): "So the intention to libel the plaintiff may be proved not only when the defendant knows and intends to injure the individuals, but also when he has made a statement concerning a man by a description by which the plaintiff is recognized by his associates, if the description is made recklessly, careless whether it hold up the plaintiff to contempt and ridicule or not. In such a case it is no answer for the defendant to say that he did not intend the plaintiff, because he had never heard of him; he intended to describe some living person: he can suggest no one else; and the plaintiff proves that he is believed by his acquaintances and friends to be the person aimed at, and has suffered damage thereby." These words have no application where it cannot be said there is any reference by name, by description, or by necessary inference to the plaintiff in the words complained of.

For these reasons, in my judgment, the plaintiff gave no evidence which would support the meaning alleged by the innuendo, and the words in their ordinary meaning not being defamatory, the judge should have directed the jury to find a verdict for the defendants.

I need hardly say that I have hesitated considerably before coming to a decision different from that which has commended itself to Scrutton and Russell L.JJ., but I have at any rate the satisfaction of feeling that my interpretation

(1) [1909] 2 K. B. 480.

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of the law is more consistent with justice and fairness than the view which they have felt compelled by the authorities to adopt. It must be remembered that there is no special law, for the purposes we are considering, applicable to libels by newspapers. If the decision of my brethren in this case is right, it would be right to say that I could be successfully sued for damages for libel if, having been introduced to two apparently respectable people as persons engaged to be married, I repeated that statement in a letter to a friend, on the ground that my words meant that a lady totally unknown to me, who was in fact the wife of the man, was not his wife and was living in immoral intercourse with him. It seems to me wholly unreasonable to hold that my words could be construed as meaning anything of the kind, and wholly unjust that I should be made to pay damages because some unduly suspicious person drew an inference from the fact I stated, which was derogatory to the woman in question—and I am afraid that for the future people will have to walk with wary steps through life and hesitate a long time before they accept the assertion of any one whom they have known as a bachelor, that he is in truth a single man. The desire to find in the law rules which are consonant with reasonable notions of what is fair and just is sometimes an imperfect guide. I fail however to find in any of the decisions anything which compels me to come to the conclusion that the words used by the defendants in this case are reasonably capable of the meaning alleged in the innuendo. As I have indicated, this case on its facts, in my judgment, differs entirely from the case of *E. Hulton & Co.* v. *Jones* (1), where the words complained of were on the face of them defamatory, and were such as would naturally be applied to a man, if one existed, who bore the name mentioned in the libel.

In my opinion the judge should have ruled that there was no case to go to the jury, and that the result of this appeal should be: appeal allowed and judgment entered for the defendants with costs.

(1) [1910] A. C. 20.

RUSSELL L.J. The relevant facts in this appeal are few, and may be briefly stated. The defendants, in the issue of the Daily Mirror for February 21, 1928, published a photograph of a man and a young woman with the following words beneath it: "Mr. M. Corrigan, the racehorse owner, and Miss" X, "whose engagement has been announced." The man shown in the photograph was the lawful husband of the plaintiff, to whom he had been married in 1916. The plaintiff sued the defendants for damages for libel, alleging that the photograph and words bore a meaning defamatory of the plaintiff—namely, that the plaintiff was not lawfully married to her husband, but had lived with him as his mistress, pretending to her friends to be a respectable married woman. The judge, being of opinion that the photograph and words were capable of bearing a meaning defamatory of the plaintiff, left it to the jury to decide whether they were in fact defamatory of the plaintiff. The jury returned a verdict for the plaintiff for 500*l*. The defendants appeal on three grounds: (1.) that the judge should have withdrawn the case from the jury; (2.) that the judge misdirected the jury; and (3.) that the damages were excessive.

On the question of misdirection and excessive damages, there is no reason, in my opinion, for interfering with the verdict and judgment on either of those grounds.

The remaining ground of appeal, however, raises questions and considerations of difficulty. The defendants contend that the published matter is not, on the face of it, defamatory at all either of the plaintiff or of any one else. That must I think be conceded. Nevertheless words may be published with reference to such circumstances, and to such persons knowing the circumstances, as to convey a meaning which would not be attributable to them in different circumstances: see per Lord Blackburn in *Capital and Counties Bank* v. *Henty*. (1) So too, I think, words may be published with reference to such circumstances, and to such persons knowing the circumstances, as to suggest an inference in regard to some one not in terms mentioned in the statement, which

(1) 7 App. Cas. 741, 771.

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would not be involved by the publication of the same words either in different circumstances or to persons ignorant of the particular circumstances which occasion the inference.

The first thing to consider in this case is this question: Can the published matter be reasonably construed as a statement that Mr. Corrigan is an unmarried man? For myself I would answer that the published matter may not only reasonably be so construed, but must necessarily be so construed. I discard as too far fetched the suggestion that it might refer to the announcement of an engagement made by a married man either in anticipation of a divorce or with a view to seduction. If then the published matter is a statement that A.B. is an unmarried man, can A.B.'s wife successfully complain of that as a statement defamatory of her? This must depend upon (1.) whether the statement that A.B. is an unmarried man is capable of being defamatory of A.B.'s wife, and (2.) whether the statement is in fact defamatory of A.B.'s wife. McCardie J. came to the conclusion that in the present case the published matter was capable of being defamatory of the plaintiff. I can see no reason for differing from that view. The Lord Chancellor in *E. Hulton & Co.* v. *Jones* (1) used the following language, which seems appropriate to the present case: "Libel . . . . consists in using language which others, knowing the circumstances, would reasonably think to be defamatory of the person complaining of and injured by it. A person charged with libel cannot defend himself by showing that he intended in his own breast not to defame, or that he intended not to defame the plaintiff, if in fact he did both." Applying those words to a statement (which for this purpose must be false) that A.B. is an unmarried man, is it a reasonable view that people who have known a lady who has called and is calling herself the wife of A.B. might think the statement to be defamatory of the lady? In my opinion the view is an eminently reasonable one. Whether, being capable of a defamatory meaning, the statement was in the circumstances of the particular

(1) [1910] A. C. 20.

case defamatory of the plaintiff, is another question. That is a question of fact for the jury to answer according to their view of the evidence adduced.

It was argued by the appellants that no liability attaches to the publisher of a statement which is not on the face of it defamatory, but which only becomes defamatory in the light of outside facts, unless those facts are known both to the person who publishes the statement and to the persons to whom it is published. For this proposition reliance was placed upon the views expressed in *Henty's* case (1) by Brett L.J. in the Court of Appeal. So far as concerns knowledge on the part of the persons to whom the statement is published, no difficulty presents itself. If the defamatory meaning only arises from a knowledge of outside facts, and the persons to whom the statement is published are ignorant of those facts, those persons could not reasonably attach a defamatory meaning to the statement.

So far as concerns knowledge on the part of the person by whom the statement is published, I feel difficulty in supporting the proposition. Brett L.J. undoubtedly asserts it, and as I understand him he bases the publisher's freedom from liability upon absence of intention by him to defame. That is the only meaning which I can attribute to the following language: "I think it is necessary that the facts should be known both to the person who indites the libel and to the persons to whom it is published, because if facts are known to the latter persons from which they might reasonably suppose that the document is defamatory, but those facts are not known to the person who wrote it, if he were held liable he would be made liable for doing that which by the hypothesis he could have no reason to suppose would injure anybody, the language used being such as in its ordinary sense would not be defamatory of anybody."

It was said that Lord Blackburn expressed similar views in the House of Lords, but I am unable to satisfy myself that he did so. But however that may be, the views so expressed are only obiter dicta, and cannot in my opinion

(1) 5 C. P. D. 514, 540.

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survive the decision of the House of Lords in *E. Hulton & Co.* v. *Jones*. (1)

Liability for libel does not depend on the intention of the defamer; but on the fact of defamation. If you once reach the conclusion that the published matter in the present case amounts to or involves a statement that Mr. Corrigan is an unmarried man, then in my opinion those persons who knew the circumstances might reasonably consider the statement defamatory of the plaintiff. The statement being capable of a meaning defamatory to the plaintiff, it was for the jury upon the evidence adduced to decide whether the plaintiff had been libelled or not.

It was said that it would be a great hardship on the defendants if they were made liable in consequence of a statement innocent on its face and published by them in good faith. The answer to this appeal for sympathy seems to be to point out that, in stating to the world that Mr. Corrigan was an unmarried man (for that construction is the foundation of their liability), they in fact stated that which was false. From a business point of view no doubt it may pay them not to spend time or money in making inquiries, or verifying statements before publication; but if they had not made a false statement they would not now be suffering in damages. They are paying a price for their methods of business.

A further point was suggested in argument, of this nature: It was said that the published matter might possibly be construed by those who knew of the existence of the plaintiff, as meaning that Mr. Corrigan had, by reason of a divorce obtained by his wife, ceased to be her husband. If that were so, then it was argued that the published matter, being capable of a meaning in no way defamatory of the plaintiff, should only have that meaning attributed to it; and that accordingly it was not open, either to the judge to leave the case to the jury or to the jury to find libel. The foundation of this argument rested on the following passage from the judgment of Brett L.J. in *Henty's* case (2): "It seems to me unreasonable that, when there are a number of good

(1) [1910] A. C. 20. (2) 5 C. P. D. 514, 541.

interpretations, the only bad one should be seized upon to give a defamatory sense to the document." It was suggested that in face of that opinion the innocent interpretation, if there be one, must always prevail. I cannot follow how this can be right; for if it be, then how can the rules survive that the judge must decide whether the statement is capable of a defamatory meaning and that the question of libel or no libel is for the jury? Each of these rules postulates the possibility of various meanings, defamatory and non-defamatory, attaching to the statement. In truth, when the context is examined it will be found that the statement of Brett L.J. is addressed only to the question whether, as regards the particular customers to whom (and to whom only) the alleged libel in *Henty's* case (1) was published, it would be reasonable for them, who knew the facts, to attribute to the document its only possible defamatory meaning. The quotation from the Lord Justice does not, in my opinion, support the argument which was based upon it.

When all is said and done, the defendants have published to the world the statement that Mr. Corrigan was, on February 21, 1928, an unmarried man. That statement was in fact false, and has been found by the jury to be defamatory of the plaintiff, and to have caused her damage. There is ample evidence to support the findings, unless we can say that the published matter was incapable of being defamatory of the plaintiff. This I am not prepared to do.

For these reasons I agree with Scrutton L.J. that the appeal fails.

Appeal dismissed.

Solicitors for appellants: *Michael Abrahams, Sons & Co.*
Solicitors for respondent: *Edmond O'Connor & Co.*

(1) 5 C. P. D. 514; 7 App. Cas. 741.

W. H. G.

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NEWSHOLME BROTHERS *v.* ROAD TRANSPORT AND GENERAL INSURANCE COMPANY, LIMITED.

June 13, 14, 17; *July* 1.

Insurance—Proposal—Misstatements—Incorrect Statements written by Agent —Whether Knowledge of Agent to be imputed to Insurers.

A proposal form for the insurance of a motor-bus was signed by the person wishing to effect the insurance, but the answers to the questions therein, which were warranted to be true and to form the basis of the contract, were filled in by the insurance company's agent who, although told the true facts, wrote, for some unexplained reason, answers which were untrue in a material respect. The agent was not authorized by the insurance company to fill in proposal forms, and it did not appear that the company knew that he had in fact done so. His duties were to procure persons to effect insurances and to see, as far as he could, that proposal forms were correctly filled up; he was not authorized to give a cover note or to enter into a policy of insurance. A policy was issued to the person who had signed the proposal form, and during its currency he made a claim under it, but the insurance company repudiated liability on the ground of the untrue statements in the proposal form:—

Held, that the agent of the insurance company in filling in the proposal form was merely the amanuensis of the proposer, that the knowledge of the true facts by the agent could not be imputed to the insurance company, and therefore that the insurance company was entitled to repudiate liability on the ground of the untrue statements in the proposal form.

Bawden v. *London, Edinburgh, and Glasgow Assurance Co.* [1892] 2 Q. B. 534 distinguished.

Biggar v. *Rock Life Assurance Co.* [1902] 1 K. B. 516 followed.

Per Scrutton L.J.: The decision in *Bawden's* case (supra) is not applicable to a case where the agent himself, at the request of the proposer, fills up the answers in purported conformity with information supplied by the proposer. If the answers are untrue, and he knows it, he is committing a fraud which prevents his knowledge being the knowledge of the insurance company. If the answers are untrue, but he does not know it, he has no knowledge which can be imputed to the insurance company. In any case a man who has signed, without reading it, a document which he knows to be a proposal for insurance, and which contains statements in fact untrue and a promise that they are true and are to be the basis of the contract, cannot escape from the consequences of his negligence by saying that the person he asked to fill it up for him was the agent of the insurance company.

Observations on the question how far the Court of Appeal is bound by its previous decisions.

APPEAL from a decision of Rowlatt J.

The applicants, Newsholme Brothers, in January, 1927, made a proposal to the respondent insurance company for

the insurance of their motor-bus. The proposal form was signed by H. Newsholme, a partner in the applicant firm, but the answers were written by one Willey, an agent of the respondents. The proposal form contained the following clause: "We hereby warrant that the answers stated above are true, that we have withheld no information which might influence the acceptance of this proposal, and that the warranty hereby given shall be held to be promissory and shall be the basis of the contract between us and the company. We agree to accept a policy in the current form now issued by the company to cover risks of the nature insured, and subject to the terms, conditions and exceptions contained in such current form of policy whereof we shall be deemed to have notice, and we agree to pay the premium thereon." A policy was thereafter issued by the respondents to the applicants, and the premium was paid.

During the currency of the policy an accident occurred to the applicants' motor-bus whereby it was damaged, and the passengers in it were injured. The applicants claimed to be indemnified in respect of the damage to the motor-bus and in respect of claims by the injured persons, but the respondents repudiated liability on the ground that the written proposal upon which the policy was issued contained untrue and incorrect statements and failed to disclose the true facts. The matter was then referred to an arbitrator, who found that the answers to questions 7, 8 and 14 on the proposal form "were not true or correct, and thereby information was withheld from the insurance company which might have influenced the acceptance of the proposal." Those questions and answers were as follows: "(7.) Have you previously been insured for motor risks? If so, give name of company." Answer: "Atlas." "(8.) Have any insurers at any time in respect of any motor vehicle: (*a*) declined your proposal, or cancelled or not invited renewal of your policy"? Answer: "No"; "(*b*) required increased premium or special conditions on renewal, or required you to carry the first amount of each loss"? Answer: "No." "(14.) State hereunder particulars of all claims made or

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accidents which have occurred in connection with any motor vehicles owned by you, or under your control, during the past two years, whether insured or not." In answer, a schedule was filled up stating two accidents during the past twelve months, and two during the previous twelve months. The arbitrator did not find what the true answers would have been, and the case proceeded on the basis that the answers were untrue in material respects. The arbitrator found that the answers were in the handwriting of Willey, the agent; that Willey was told the true facts, but that it did not appear why he did not write them down correctly, as told to him by Newsholme. The arbitrator added that apparently Newsholme left the matter entirely in the hands of Willey. As to Willey's position, the arbitrator found as follows in the award: "He was appointed an agent by writing under the hand of the Agency Manager of the insurance company and was supplied by the insurance company with proposal forms. His duties were to procure persons to take out insurance policies with the insurance company and to obtain from them duly filled in and signed proposal forms. He was authorised by the insurance company to receive premiums on their behalf. He was not authorised to give a cover note or enter into any policy of insurance. I do not find that the insurance company authorised Willey to fill in the proposal forms, or that they were aware that he had in fact done so." Being asked by the Court to amplify and explain the finding as to Willey's position and duty, the arbitrator merely stated that it was Willey's duty to see, as far as he could, that the answers on a proposal form were sound and correct, but he was not to investigate them; the answers were to be regular, as far as the agent knew.

The arbitrator awarded that in law the respondents had, through their agent Willey, full knowledge of the true facts, and, having accepted the premium from the applicants with such knowledge, were liable under the policy.

The question for the opinion of the Court was whether the arbitrator was right in so awarding.

Rowlatt J. held that Willey was the agent of the applicants in filling up the proposal, and that the arbitrator was wrong when he held that Willey's knowledge was the knowledge of the respondents. He accordingly held that as the answers written on the proposal form were incorrect in a material respect the respondents were not liable under the policy.

The applicants appealed.

Jardine K.C. and *John Neal* for the appellants. This case is covered by *Bawden* v. *London, Edinburgh, and Glasgow Assurance Co.* (1), which is binding upon this Court. There the knowledge of Quin, the local agent or canvasser of the insurance company, that the assured was a one-eyed man, although in the proposal form which was filled up by Quin it was stated that he had "no physical infirmity," was imputed to the insurance company. Here Willey, the respondents' agent, knew the correct answers to the material questions, and that knowledge must be imputed to the respondents. In *Biggar* v. *Rock Life Assurance Co.* (2), Wright J., following the American decision in *New York Life Insurance Co.* v. *Fletcher* (3), held that in filling in false answers in the proposal the agent was acting, not as the agent of the insurance company, but as the agent of the assured who, moreover, must be taken to have read and adopted the answers in the proposal before signing it. That decision is inconsistent with *Bawden's* case (1), and is based on the fraud of the agent. In this case there is no suggestion of fraud. In *Holdsworth* v. *Lancashire and Yorkshire Insurance Co.* (4) Bray J. followed and applied *Bawden's* case (1); it was applied also in *Thornton-Smith* v. *Motor Union Insurance Co.* (5) In *Golding* v. *Royal London Auxiliary Insurance Co.* (6), and in *Ayrey* v. *British Legal & United Provident Assurance Co.* (7), disclosure of the true facts to the insurance company's agent was held to bind the insurance company,

(1) [1892] 2 Q. B. 534.
(2) [1902] 1 K. B. 516.
(3) (1886) 117 U. S. 519.
(4) (1907) 23 Times L. R. 521.
(5) (1913) 30 Times L. R. 139.
(6) (1914) 30 Times L. R. 350.
(7) [1918] 1 K. B. 136.

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although the answers on the proposal form were incorrectly stated. *Bawden's* case (1) has been criticized both in the Scottish and the Irish Courts—in the former in *M'Millan* v. *Accident Insurance Co.* (2) and in the latter in *Taylor* v. *Yorkshire Insurance Co.* (3), but those decisions being in conflict with *Bawden's* case (1) should not be followed; moreover they are not binding upon this Court.

[They also referred to *Levy* v. *Scottish Employers' Insurance Co.* (4)]

Secondly, the respondents must be taken to have waived any defect by accepting the premium through Willey, who was authorized in that behalf: *Wing* v. *Harvey.* (5) In that case a life policy was subject to a condition making it void if the assured went beyond certain limits without licence. An assignee of the policy on paying the premium to the insurance company's agent informed him that the assured was resident beyond the prescribed limits. With that knowledge the agent received the premium, and it was held that the insurance company was precluded from insisting on the forfeiture.

Schiller K.C. and *Paley Scott* for the respondents. The principle of *Bawden's* case (1) ought not to be extended to a case where the circumstances are not identical with those upon which it was decided. There the applicant was illiterate, and being unable to fill in the application form for himself, was obliged to get Quin, the defendants' canvasser, to fill it up for him. Moreover, the applicant was to the knowledge of Quin a one-eyed man. That knowledge was to be imputed to the insurance company, because it was acquired by Quin while acting on their behalf. In these circumstances it was held that Quin was the agent of the insurance company to negotiate the terms of the proposal and to obtain a form of proposal which the company would accept. That is the view of *Bawden's* case (1) taken by Bailhache J. in *Keeling* v. *Pearl Assurance Co.* (6) Another fact which distinguishes *Bawden's* case (1) from the present

(1) [1892] 2 Q. B. 534.
(2) 1907 S. C. 484.
(3) [1913] 2 I. R. 1.
(4) (1901) 17 Times L. R. 229.
(5) (1854) 5 De G. M. & G. 265.
(6) (1923) 129 L. T. 573.

is that the Court had no evidence of the terms of Quin's agency and had to infer them from his acts: see per Kay L.J. (1) The Court inferred that Quin had authority to fill in the proposal form on behalf of the company. That inference of fact does not bind the Court in the present case. It was no part of Willey's agency to investigate the truth of the appellants' answers.

[RUSSELL L.J. When Willey produced the proposal form he was acting as agent for the respondents; so also when he received a true answer to a question in the proposal form; at what time did his knowledge cease to be imputable to them?]

Either he honestly misunderstood the answer or else he deliberately falsified it; in the former case the policy is void beyond question; in the latter case he ceased to be the agent of the respondents when he determined to defraud them: *Lacey* v. *Hill* (2); *In re Hampshire Land Co.* (3); *Houghton & Co.* v. *Nothard, Lowe & Wills.* (4) If the knowledge of the true facts is not to be imputed to the respondents, the general principle applies that a man who sets his hand to a written document must be held to have knowledge of its contents: *The Luna* (5); *Life and Health Assurance Association* v. *Yule.* (6)

There is no finding that the respondents waived any of the conditions of the policy, and no facts are stated on which waiver can be found.

Jardine K.C. in reply. While there may be no absolute rule that this Court must follow its previous decisions it will not depart from them unless in very exceptional circumstances. A Court of Appeal consisting of six members may reconsider a decision of three judges: see per Lord Esher M.R. in *Kelly & Co.* v. *Kellond* (7), and in fact in *Wynne-Finch* v. *Chaytor* (8) a full Court reversed a previous decision of the Court of Appeal composed of a lesser number. It is submitted

(1) [1892] 2 Q. B. 541.
(2) (1876) 4 Ch. D. 537, 549.
(3) [1896] 2 Ch. 743.
(4) [1928] A. C. 1.
(5) [1920] P. 22.
(6) (1904) 6 F. 437.
(7) (1888) 20 Q. B. D. 569, 572.
(8) [1903] 2 Ch. 475.

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therefore that this Court must follow *Bawden's* case (1), where the facts were practically identical with those in the present case.

Cur. adv. vult.

July 1. SCRUTTON L.J. read the following judgment: This appeal from Rowlatt J. raises the kind of troublesome question which inevitably arises from the course of business of accident and life insurance companies, as contrasted with that of marine insurance companies. The contract of insurance requires the utmost good faith; the insurer knows nothing; the assured knows everything about the risk he wants to insure and he must disclose to the insurer every fact material to the risk. The marine underwriter sits still and asks no questions; a proposal for insurance is brought to him by a broker, to whom he pays commission, but who is the agent of the assured. The assured and his broker must disclose everything they know material to the risk. The knowledge of the broker is not the knowledge of the underwriter, and the broker is bound to communicate it to the underwriter. I deal hereafter with his duty to his own principal.

The practice of life and accident insurers is different; they employ an agent to canvass and procure proposals for them. In general, he cannot make contracts binding them, but only submits proposals for their consideration. Unlike the marine underwriter, they do ask questions: they give their agent a proposal form containing a number of questions on matters which they think material; and he is expected to submit that proposal form with the answers of the proposed assured filled in and signed by the assured. The proposal form contains a promise, a warranty, that the truth of the proposer's answers shall be the basis of the contract, and is signed by the proposer. It is inevitable in such a course of business that the agent employed to get proposals will sometimes fill in or assist in filling in the answers on the form, and if they are inaccurate, the proposer, though he has signed the promise that those answers are true, alleges that

(1) [1892] 2 Q. B. 534.

the fault is that of the agent of the insurance company who filled in the answers, and claims, not that he can rescind the contract, but that he can rely on it without being prejudiced by the inaccuracy of the answers he has signed as true. There then comes a conflict, which is visible in the authorities cited to us, between the desire to hold the insurer, who employs an agent to bring him business, liable for anything that agent does in procuring business, and, on the other hand, the contention that a man who signs a promise that certain written statements are true and the basis of his contract, which statements, if he read them before signing, he would know to be untrue, cannot claim to vary his contract by omitting that promise and misstatement. The insurance companies also run the risk of the contention that matters they do not ask questions about are not material, for, if they were, they would ask questions about them.

The facts in the present case appear in an award stated by an arbitrator in the form of a special case, as supplemented by further information given by the arbitrator as the result of a reference back to him by the Court. Messrs. Newsholme Brothers are motor-bus proprietors; Mr. Willey is an agent of the insurance company. On January 18, 1927, Mr. A. Newsholme, a partner in the firm, signed a proposal for an insurance of a motor-omnibus. The proposal form contained a warranty: "We hereby warrant that the answers stated above are true, that we have withheld no information which might influence the acceptance of this proposal, and that the warranty hereby given shall be held to be promissory, and shall be the basis of the contract between us and the company. We agree to accept a policy in the current form now issued by the company to cover risks of the nature insured, and subject to the terms, conditions and exceptions contained in such current form of policy whereof we shall be deemed to have notice, and we agree to pay the premium thereon." The form also contained fourteen questions to be answered, and answers were included in the form signed by A. Newsholme. The arbitrator finds that the answers to questions 7, 8 and 14, "were not true or correct, and thereby

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information was withheld from the insurance company which might have influenced the acceptance of the proposal." That finding is in the terms of the warranty. The questions and answers were as follows: "(7.) Have you previously been insured for motor risks? If so, give name of company." Answer: "Atlas." "(8.) Have any insurers at any time in respect of any motor vehicle: (*a*) declined your proposal, or cancelled or not invited renewal of your policy." Answer: "No." (*b*) "required increased premium or special conditions on renewal, or required you to carry the first amount of each loss?" Answer: "No." "(14.) State hereunder particulars of all claims made or accidents which have occurred in connection with any motor vehicles owned by you, or under your control, during the past two years, whether insured or not," and then a schedule is filled in stating certain accidents. The arbitrator does not find what the true answers would have been; the case must proceed on the basis that these answers were untrue in material respects. The arbitrator finds that the answers were in the handwriting of Willey, the insurance agent, and that Newsholme apparently left the matter entirely in the hands of Willey. He finds that Willey was told the true facts by Newsholme, and that the reason for his not writing down the true facts did not appear. It must be either (1.) that he unintentionally wrote untruths, because (*a*) he did not understand Newsholme's communication to him, or (*b*) forgot what he was told, or (*c*) did not understand the questions asked; or (2.) that he intentionally wrote down untrue facts to earn his commission. Whichever alternative is the truth, Willey was writing the answers as the amanuensis of Newsholme, whose answers they were to be; and after Willey had written the answers, Newsholme signed the proposal, and must be taken to have promised the truth of what he signed. I do not understand how in receiving the information as to the answers and in writing those answers, Willey can be taken to be anything else than the agent of the person whose answers they are to be, and he must be taken to have written them and promised they were true. I can understand a contention that

Newsholme was induced to sign by the representation of Willey, that these answers were what the insurance company required, though such a contention would be difficult to sustain in view of Newsholme's knowledge that the answers were untrue; but the result of such a contention, if sustained, would be rescission of the contract, not its enforcement with the omission of the untrue answers.

The arbitrator's view is expressed in para. 13 of the Case, and appears to rest on waiver of the untruth by acceptance of the premium, with knowledge of the untruth, the knowledge of Willey being the knowledge of the insurance company. This requires a consideration of the position of Willey, as to which the original Case contained para. 12: "The facts as to the position of the said J. Willey are as follows: He was appointed an agent by writing under the hand of the Agency Manager of the insurance company and was supplied by the insurance company with proposal forms. His duties were to procure persons to take out insurance policies with the insurance company and to obtain from them duly filled in and signed proposal forms. He was authorised by the insurance company to receive premiums on their behalf. He was not authorised to give a cover note or enter into any policy of insurance. I do not find that the insurance company authorised Willey to fill in the proposal forms, or that they were aware that he had in fact done so." When the case was first before this Court, we thought it unsatisfactory that, if there was a written appointment which had not been before the arbitrator, we should not know what it was. We did not understand what the arbitrator meant by the statement that Willey's duty was to procure proposal forms "duly" filled in, and we did not quite understand whether the last sentence of para. 12 was a positive or only a negative finding. We accordingly sent the case back to the arbitrator asking him to answer the questions of the Court. The relevant extract from the judgment of this Court is as follows: "The matter will go back to the arbitrator with a request on the part of the Court, that if he is able, consonant with his other judicial duties, to answer the questions of the Court, he will

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kindly do so. The matters on which the Court wants information are: What was the writing, if any—or rather, not 'if any' because he says that there was writing—what was the writing under which Willey was appointed: if it appears from the writing, the application and the answer, that he was appointed upon the usual terms and conditions, what were the usual terms and conditions so far as relevant to the matters in dispute in the case: and to ask him to expand a little what he meant by the word 'duly' filled in, and to state a little more precisely the exact nature of his finding in the last sentence of paragraph 12, whether it is merely a negative finding saying: 'I do not find anything' or whether it is in any sense, and what sense, a positive finding. Then the matter will come back to this Court when the arbitrator has dealt with the matter." I regret to say that in my opinion this Court has not got that assistance from the arbitrator which we asked for and which, should we in the future ask him for, in his capacity as county court judge, we shall be entitled to require. He has apparently declined to report in writing the answers to the questions we asked, but refers us to forty-nine pages of shorthand notes for the information we want. As to the "written appointment," he forwards us the application and appointment, which is "as agent on the usual terms and conditions." We had seen this document at the first hearing, but it was disputed whether it was really the "appointment." As we had seen it, we asked the arbitrator, if he found this was the appointment, to tell us what the usual terms and conditions were relevant to the matter in dispute—namely, the duty of the agent as to filling up the proposal form. This the arbitrator has declined to do, for reasons which, as far as I can understand them, are quite insufficient, but we are left with a statement that the arbitrator does not find that Willey had authority from the company to fill in the proposal forms, but that his duty was to obtain duly filled in and signed proposal forms. Asked to explain what he means by "duly," he gives an explanation that he meant that the agent must, as far as he can, see that the answers were sound and correct, but he is not to investigate

them; the answers must be regular, as far as the agent knows. As a matter of law, I do not understand this; the proposal is the proposal of the assured, the responsibility of declaring it true is his; how can it be the duty of the company, through their directors or agents, to the assured, to see that the assured makes correct statements of fact, when he promises them they are true, especially when the arbitrator declines to find that the agent had authority from the company to fill in the form, or what in fact the usual conditions of his appointment in this matter were.

On the Case as originally stated, without the subsequent explanations, Rowlatt J. took the view that Willey was the agent of Newsholme in filling up the proposal, and that Newsholme promised in writing that what Willey wrote and Newsholme signed was to be the basis of the contract, and that under these circumstances the contract could not be varied by oral statements from Newsholme to Willey. He therefore decided that the arbitrator came to a wrong decision in law when he held that the knowledge of Willey was the knowledge of the company. Newsholme Brothers appeal.

The difficulty on the authorities arises from the alleged conflict between the decisions of the English Court of Appeal in *Bawden* v. *London, Edinburgh and Glasgow Assurance Co.* (1) and the decisions of Wright J. in *Biggar* v. *Rock Life Assurance Co.* (2), and of Wills and Phillimore JJ. in *Levy* v. *Scottish Employers' Insurance Co.* (3) It is more important that this conflict should be determined because: (1.) Wright J. acted on and followed a decision of the Supreme Court of the United States in *New York Life Insurance Co.* v. *Fletcher* (4), the reasoning in which is not easy to reconcile with *Bawden's* case (1); (2.) the Scottish Courts in *M'Millan's* case (5) and *Yule's* case (6) have declined to follow *Bawden's* case (1) and have expressed their preference for *Biggar's* case (2) and *Fletcher's* case (4); (3.) the Irish Courts by the mouth of Palles C.B. have expressed a similar

(1) [1892] 2 Q. B. 534.
(2) [1902] 1 K. B. 516.
(3) 17 Times L. R. 229.
(4) 117 U. S. 519.
(5) 1907 S. C. 484.
(6) 6 F. 437.

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preference in *Taylor* v. *Yorkshire Insurance Co.* (1) *Bawden's* case (2), to quote the present Lord Chancellor, who, as a Lord Justice, was present at the first hearing of this case, is therefore a very "distinguished" case.

The facts in *Bawden's* case (2) were as follows: Bawden was an illiterate man, almost unable to read or write, but able to write his name. He had only one eye. Quin was a local agent of the insurance company. No evidence was given as to the extent of his authority, but the Court "gathered from what he did" that he had no authority to make contracts, but that he had authority to negotiate and settle the form of the assured's proposal for insurance, and he was supplied with forms for that purpose. Lord Esher used the phrase "negotiate and settle the terms of the proposal"; Lindley L.J.: "He was the person deputed by the company to receive the proposal, and to put it into shape"; Kay L.J.: "It was his duty to get the form of proposal filled up and signed by the proposer, and to see that this was done correctly." It is not clear on what evidence the learned Lords Justices came to this finding. The proposal form contained a number of questions, the answers to which were filled in by Quin at the dictation of Bawden, and these answers were all correct. It also contained a printed declaration, the material words of which were: "I . . . . have no physical infirmity, nor are there any circumstances that render me peculiarly liable to accidents. . . . . I agree that the statements contained in this proposal shall form the basis of the contract between me and the company." It also contained a marginal note against this clause: "If not strictly applicable, particulars of any deviation must be given at back." No particulars as to his one-eyed condition were given at back by either Quin or the assured, but Bawden signed his name to the proposal, and Quin forwarded it to the company who accepted it. Quin knew, at the time he did so, that Bawden had only one eye. The policy was renewed from time to time, and Bawden met with an accident which destroyed the sight of the remaining eye. The Court held that Quin's knowledge was the

(1) [1913] 2 I. R. 1. (2) [1892] 2 Q. B. 534.

knowledge of the company, who must, therefore, be taken to have contracted with a man who, to their knowledge, was a one-eyed man. The policy insured 500*l.* "if the direct effect of [the injury by accident] shall, within three calendar months from the occurrence of such injury, occasion . . . . permanent total disablement," e.g. "irrecoverable loss of sight in both eyes"; and 250*l.* if it caused complete and irrecoverable loss of sight in one eye. The Court gave the plaintiff 500*l.*, though it is difficult to see how the accident within three months caused loss of sight in both eyes; the loss of sight in one eye had been caused long before the accident. The Court held that the knowledge of the agent was the knowledge of the company and that the company, therefore, could not rely on the declaration of the assured that he had no physical infirmity, and that this was the basis of the contract. It will be noted that the agent made no inaccuracy in filling up the proposal, unless it was that he did not enter particulars of deviation on the back. Kay L.J. says that it was his duty to the company to do this, but the other two judges do not mention the point. Kay L.J. is also the only judge who says that it was Quin's duty to see that the proposal was filled up "correctly"; Lindley L.J. uses the phrase "put it into shape," and Lord Esher says "negotiate and settle." I find considerable difficulty in seeing how a person who fills up the proposal can be the agent of the person to whom the proposal is made. A man cannot contract with himself. A. makes a proposal to B. by signing it, and communicating it to B. If A. gets some one—C.—to fill up the form for him before he signs it, it seems to me that C. in doing so must be the agent of A. who has to make the proposal, not of B. who has to consider whether he will accept it. If C. is also the agent of B. to procure proposals, and induces A. to make a proposal by representing that a certain form of proposal contains the particulars that B. wants to know, when it does not, the remedy seems to be to rescind the written contract procured by misrepresentation, not to alter the written contract and claim the benefit of it as altered.

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This is the line of criticism contained in the Scottish and Irish cases. In *M'Millan's* case (1) Lord Salvesen doubts the inference that Quin had authority to negotiate and settle the proposal, but said that if he had, there was a contract in writing under the signature of the proposer. He cites the view of the Lord Justice Clerk in *Yule's* case (2), where *Biggar's* case (3) was followed, who says: "I hold that in filling up the paper for the defender at his request he was acting for him. Further, I hold that if the defender did not choose to see that there were no mis-statements in the proposal before he signed it he must be held responsible for it as being his." In *M'Millan's* case (1) the Lord Justice Clerk says (4): "The case of *Bawden* (5) presents more difficulty. This Court is of course not bound by it. I may be permitted to say that I do not follow the reasoning contained in the judgment. But it is unnecessary, as I think, to say more than that it is inconsistent with the decision of this Court in *Yule* (6), a later decision. I agree with the Lord Ordinary in thinking that the Court in the case of *Bawden* (5) failed sufficiently to consider that they were dealing with a written proposal as the basis of a contract. Lord Esher says that 'the proposal must be construed as having been negotiated and settled by the agent with a one-eyed man. In that sense the knowledge of the agent was the knowledge of the company.' This seems to me to be erroneous. The knowledge of the company was the knowledge of the directors, who were the only persons who could 'settle' the contracts, and they had nothing before them but the proposal, the answers in which they dealt with as being true. There was therefore no knowledge by the company that the insured had only one eye. It would, I think, be most unjust to hold that an insurance policy was valid because a servant of the insurance company knew a fact which was contrary to a statement in the proposal signed by the person seeking the insurance, although it was certain that the policy would never

(1) 1907 S. C. 484.
(2) 6 F. 437, 441.
(3) [1902] 1 K. B. 516.
(4) 1907 S. C. 491.
(5) [1892] 2 Q. B. 534.
(6) 6 F. 437.

have been granted if the insured had seen to it that the questions put to him were answered truthfully for the information of those who alone could grant a valid policy." In the Irish case—*Taylor* v. *Yorkshire Insurance Co.* (1)—the point hardly arose, as the knowledge of the agent, which contradicted the answers which he filled in, and which the proposer signed, was not derived from the course of his agency for the defendant company, but from his previous agency for another company; but Palles C.B. says (2): "In *Bawden's* case (3) the plaintiff was an illiterate man, and, to the knowledge of the defendants' agent, was almost unable to read or write, although he could write his name. He had but one eye. Quin, the company's agent, saw this when the plaintiff applied to him to be insured. The form of the proposal was a complicated one, and contained a note: 'If not strictly applicable, particulars of any deviation must be given at back'; which may well be taken to have been a direction, not to the proposer, but to the agent. Lord Esher M.R. rested his judgment on the imputation to the company of the knowledge acquired by their agent during the negotiations for the policy, that the proposer had but one eye. Lindley and Kay L.JJ., however, in addition to relying on this imputation of notice, held that a duty lay upon Quin, in reference to the filling up of the proposal, Lindley L.J. stating it was his duty 'to put it into shape' and Kay L.J. that it was his duty to see that it was filled up correctly, and to have written at its back that the proposer had but one eye—a fact which rendered the form not strictly applicable. Thus, one Lord Justice expressly and certainly, and the other probably, bases the duty which it is alleged makes the company's agent an agent of the proposer to fill up the answers, on the special circumstances of that particular case. This is the view taken of it by Wills and Phillimore JJ.: *Levy* v. *Scottish Employers' Insurance Co.* (4) Agreeing, as I do, with them, I hold not only that, as a general rule, no such duty devolves upon an insurance company's

(1) [1913] 2 I. R. 1.
(2) Ibid. 16.
(3) [1892] 2 Q. B. 534.
(4) 17 Times L. R. 229.

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agent, but that the expressions relied on do not indicate an opinion that it does. On the contrary, I hold with Wright J. that although 'he may have been an agent to put the answers in form,' the agent of an insurance company cannot be treated as their agent to invent the answers to the questions in the proposal form; and that, if he is allowed by the proposer to invent the answers, and to send them as the answers of the proposer, the agent is, to that extent, the agent, not of the insurance company, but of the proposer. In arriving at this conclusion, I have not overlooked the fact that both in *Biggar* v. *Rock Life Assurance Co.* (1) and *Levy's* case (2) there was a provision in the proposal that verbal statements to the agent should not be imputed to the company; but, in relation to this question of authority, as distinct from that of imputations of notice, this is immaterial. I have read, with pleasure and advantage, the judgment of Field J. in delivering the unanimous opinion of the Supreme Court of the United States, in *New York Life Insurance Co.* v. *Fletcher* (3), relied on by Wright J., which well repays perusal."

In *Fletcher's* case (3) in the Supreme Court of the United States, the agent, given correct information by the assured, filled up the answers untruly, and the proposer signed the proposal without reading it. The Supreme Court held that the assured might have cancelled the policy as obtained by false representations, but could not, having signed it without reading it, sue on it and escape the consequences of its containing false statements. The policy signed contained a provision that only statements in writing were material to affect the rights of the company. The Court did not allow the fact that the company's agent filled in the form or heard the true oral statements of the assured, to affect the rights of the company. This reasoning was approved and applied by Wright J. in *Biggar's* case. (1) In that case the agent of the company filled in answers false to his knowledge, to the questions in the proposal form, and the assured signed

(1) [1902] 1 K. B. 516. (2) 17 Times L. R. 229.
(3) 117 U. S. 519.

the form without reading it and without knowledge of the untrue answers. It contained an agreement that the above statements should form the basis of the contract, and the provision that the knowledge of the local agent should not be notice to the company in spite of any acceptance of premium by them. The premium was paid to the agent and received by the company. Wright J. held that the agent in filling up the form was the agent of the proposer, and the proposer having signed the agreement that the truth of the statements in the form was the basis of the contract, could not recover against the company if they were untrue. He adopted the reasoning of the Supreme Court in *Fletcher's* case. (1) He does not expressly state why he does not follow *Bawden's* case (2), but I think it is that, as the agent was acting both in fraud of the company and of the proposer, his knowledge could not be imputed to his employers.

In *Levy's* case (3) the agent inserted incorrect answers in the proposal form. The proposer signed the usual clause that the truth of the statements was the basis of the contract, which also contained a clause that verbal statements to the agent were not binding on the company. The agent said that the proposer would be insured right away. The Court held that the agent had no authority to make a verbal contract to differ from the terms of the written document, and declined to follow *Bawden's* case (4), also relying on the memorandum in that case as to endorsement of variation on the back of the proposal.

These cases and *Bawden's* case (2) have been in a number of reported cases before judges of first instance, discussed and followed, sometimes on the lines of *Bawden's* case (2), sometimes on the lines of *Biggar's* case. (4)

In my view, the important question for the decision of this case is whether the knowledge of the agent, acquired in filling up the proposal for the assured, is to be taken as the knowledge of the company. If the person having authority to bind the company by making a contract in fact knows

(1) 117 U. S. 519.
(2) [1892] 2 Q. B. 534.
(3) 17 Times L. R. 229.
(4) [1902] 1 K. B. 516.

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of the untruth of the statements and yet takes the premium, the question may be different. Even then I see great difficulty in avoiding the effect of the writing signed by the proposer that the truth of the statements is the basis of the contract. But where the person contracting for the company has no actual knowledge, but only constructive notice, the difficulties of the proposer are greater. In commercial matters, the doctrine of constructive notice is not favoured: see the explanation by Lindley L.J. in *Manchester Trust* v. *Furness*. (1) In *Blackburn, Low & Co.* v. *Vigors* (2) a broker employed to effect an insurance, heard of a fact affecting the risk, and did not tell his principal. That broker did not effect that insurance, but, later, the principal did effect an insurance on that risk. On a loss occurring, the underwriters alleged that the knowledge of the first broker was the knowledge of the principal, and as the principal had not disclosed a fact he must be taken to have known, the insurance was void. The House of Lords held that this contention was erroneous; that while it was true that if the first broker had effected a policy, he would have been bound to disclose his actual knowledge to the underwriters, he was not so bound to disclose his knowledge to his principal that his principal, though it was not disclosed, must be taken to know it. Another objection to this imputation of constructive knowledge may be found in the recent decision of the House of Lords, in *Houghton's* case (3), where Lord Sumner points out that where knowledge is to be imputed to an artificial person, in the first place it must be the knowledge of the directors who deal with the company's rights, and, in the second place, the knowledge of a person who acquires it in a breach of duty, and is guilty of a breach of duty in respect to it, is not to be imputed to a company to whom, from the hypothesis, he would be very unlikely to disclose it in fact. He cites *In re Hampshire Land Co.* (4), where Vaughan Williams L.J. declines to hold that the agent's "knowledge of his own fraud or of his own breach of duty is,

(1) [1895] 2 Q. B. 539, 545.
(2) (1887) 12 App. Cas. 531.
(3) [1928] A. C. 1, 18, 19.
(4) [1896] 2 Ch. 743, 750.

under the circumstances, the knowledge of the company." I find it difficult to reconcile these principles laid down in the highest tribunal with the decision in *Bawden's* case. (1) The decision of the Court of Appeal on fact is not binding on any other Court, except as between the same parties. When the decision is that from certain facts certain legal consequences follow, the decision is, I think, binding on the Court of Appeal in any case raising substantially similar facts. Now in *Bawden's* case (1) the agent did not fill up any answer incorrectly. He did not put on the back of the proposal any statement that the assured was a one-eyed man ; one member of the Court held that by reason of the note on the form, it was his duty to do this. There is no such note here. The Court had no evidence as to the actual authority, but found what it was from what the agent did. The assured who signed the declaration was an illiterate man who could hardly read. In the present case the arbitrator produces the actual authority, but will not find that Willey had authority from the company to fill up the form and will not find what the usual terms and conditions are. The inaccuracy relied on is on the form as filled up for the proposer by Willey, and not on the form as signed by the proposer, Willey taking no part in the inaccuracy except that he knows of it by his own observation, apart from statements made to him by the proposer to enable him to complete the proposer's form for the proposer. It appears to me that the facts in this present case are not substantially similar with those in *Bawden's* case (1) so as to make the conclusions of law drawn from them in the latter case binding on this Court, even if those conclusions are not inconsistent with the two decisions in the House of Lords to which I have referred.

In my view the decision in *Bawden's* case (1) is not applicable to a case where the agent himself, at the request of the proposer, fills up the answers in purported conformity with information supplied by the proposer. If the answers are untrue and he knows it, he is committing a fraud which prevents his knowledge being the knowledge of the insurance

(1) [1892] 2 Q. B. 534.

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company. If the answers are untrue, but he does not know it, I do not understand how he has any knowledge which can be imputed to the insurance company. In any case, I have great difficulty in understanding how a man who has signed, without reading it, a document which he knows to be a proposal for insurance, and which contains statements in fact untrue, and a promise that they are true, and the basis of the contract, can escape from the consequences of his negligence by saying that the person he asked to fill it up for him is the agent of the person to whom the proposal is addressed.

In my view the judgment of Rowlatt J. was right and the appeal must be dismissed with costs.

GREER L.J. read the following judgment: I am of the same opinion. I think the judgment of Rowlatt J. was right on the ground that upon the facts stated by the arbitrator in the special case, and afterwards when the award was remitted to him for a further report, Messrs. Newsholme Brothers had not established any right to indemnity under the policy on which they made their claim in the arbitration. It is a little difficult to discover from the shorthand note exactly what the arbitrator decided on the questions submitted to him by this Court, but I think it must be taken that he found as a fact that the agent Joshua Willey, referred to in the case, was appointed agent on the terms of his application marked "J. A. G." and dated April 26, 1925, which was accepted by the respondent company by their letter of May 5, 1925, marked "E. J. A. G." He was accordingly appointed an agent of the company upon the usual terms and conditions at the remuneration mentioned in the document "E. J. A. G.," but the arbitrator has not found, in fact he has declined to find, what were the usual terms and conditions referred to in the agent's said written application of April 26, 1925. It is therefore clear that the appellants did not prove before the arbitrator what the terms and conditions of Mr. Willey's appointment were, and that all that was proved was that he was appointed an agent to obtain business for the company

in consideration of the commission mentioned in the document "E. J. A. G."

In para. 12 of the award the arbitrator says that the facts as to the position of the said J. Willey are: "He was appointed an agent by writing under the hand of the agency manager of the insurance company and was supplied by the insurance company with proposal forms. His duties were to procure persons to take out insurance policies with the insurance company and to obtain from them duly filled in and signed proposal forms. He was authorised by the insurance company to receive premiums on their behalf. He was not authorised to give a cover note or enter into a policy of insurance. I do not find that the insurance company authorised Willey to fill in the proposal form, or that they were aware that he had in fact done so."

It is difficult to understand how, in the absence of any evidence as to what the usual terms and conditions were, the arbitrator was able to enumerate his duties, as stated in para. 12, and I think, in order to decide this case on the information now before the Court, para. 12 must be read as if it stated that Mr. Willey was appointed agent on the usual terms and conditions, but that no evidence was given as to what those terms and conditions were. No doubt he was the agent of the company to obtain signed proposal forms and send them on to the company. Possibly he was authorized to receive premiums on behalf of the company. The arbitrator finds that he was not authorized to give a cover note or enter into any policy of insurance. It is clear there was no express authority proved which would entitle him to give a cover note or enter into a policy of insurance, and in the absence of such authority it seems beyond question that an agent to procure signed proposal forms is not authorized to give cover notes or enter into any policy of insurance. The learned arbitrator decided, apparently without any evidence, that it was Mr. Willey's duty to obtain from proposing insurers forms truthfully, that is, correctly, filled in. He found that the proposal form signed by Mr. A. Newsholme for the appellants contained in answer to questions 7, 8 and 14,

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statements that were not in fact true, but that true information on those points had been given to Mr. Willey. The way in which the policy came into existence is as follows: Mr. Willey on the instructions of the appellants filled in the answers to the questions on the proposal form. He inserted incorrect answers, though he had been told what the true facts were. Whether he inserted the incorrect answers because he misunderstood what he was told, or had forgotten it, or did it fraudulently, knowing that the statements were untrue, does not appear and is not found by the arbitrator. When Mr. Newsholme signed for his firm the application form, by the act of signing he authenticated the statements contained in the form, asserted to the insurance company that they were true, and signed the clause just above his signature whereby he, on behalf of his firm, warranted that the answers were true and that the warranty thereby given should be held to be promissory and should be the basis of the contract between the appellants and the company, and he agreed on their behalf to accept a policy in the current form issued by the company to cover risks of the nature insured and subject to the terms, conditions and exceptions contained in such current form of policy, whereof they should be deemed to have notice, and he agreed to pay the premium thereon.

Until that proposal form was accepted by the company, there was no contract between the parties. The company issued their usual form of policy, which contained the following recital: "Whereas the insured, designated in the schedule hereto, carrying on the business referred to in the said schedule and no other for the purposes of this insurance, has made or caused to be made to The Road Transport & General Insurance Company, Limited (hereinafter called the company) a written proposal and declaration containing certain particulars and statements, which the insured warrants are correct, and it is hereby agreed that such warranty which is to be deemed to be of a promissory nature and effect shall be the basis of this contract and considered as incorporated herein"; it also contained Condition No. 7, which is in these terms: "The due observance and fulfilment of the terms,

provisions, conditions and endorsements of this policy by the insured, in so far as they relate to anything to be done or complied with by him, and the truth of the statements and answers in the said proposal shall be conditions precedent to any liability of the company to make any payment under this policy." After the issue of the policy it is quite clear that the only contract between the appellants and the company was the contract contained in the policy, and the only promises binding on the company were those which were contained in the policy. By the policy the company undertook to indemnify the appellants against certain accidents if the statements made in the proposal form which they had signed were true; they made no promise to indemnify the appellants if those statements were not true. It seems to me that the view of the arbitrator based on the statements made to Mr. Willey, is contrary to a fundamental and well recognized rule with regard to contracts in writing. Once a contract is reduced into writing, the writing alone can be looked at as containing the terms of the contract. Anything said during the negotiations ceases to have any legal validity. The contract, and the contract alone, can be looked at in order to determine the rights of the parties. This rule is conveniently stated in the late Sir John Salmond's Principles of the Law of Contracts, edited by Professor Winfield, at pp. 103, 104: "Such being the nature of a written contract, I proceed to the consideration of a fundamental legal principle which applies to all such contracts, and distinguishes them from all others. This principle may be thus formulated: In the case of a contract in writing the written instrument is exclusive and conclusive evidence of the terms of the contract. It is exclusive evidence, and therefore no other and substituted evidence is admissible as to what these terms are. . . . . A written contract is what the written instrument says it is: nothing more, nothing less, and nothing different." The paragraph concludes by this citation from Denman C.J. in *Goss* v. *Nugent* (1): "If there be a contract which has been reduced into writing,

(1) (1833) 5 B. & Ad. 58, 64, 65.

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verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify, the written contract."

In cases like the present, therefore, it does not seem to matter whether the verbal statements which are relied upon are made to a person in the position of Mr. Willey, or are made to the directors of the company. In either case they could not affect the contract which is wholly contained in the policy of insurance with its incorporated proposal form. It was argued on behalf of the appellants that by receipt of the premiums through their agent Willey, the company have waived their right to say that they have not promised indemnity to the appellants. I fail to understand the force of this argument. Only one premium had been paid in the present case, and that premium was paid in consideration of the promise of indemnity contained in the policy. I do not see how its payment can affect the right of the insurance company to say: "As things stand, we never promised to indemnify the assured." The acceptance of the premium cannot, in my judgment, be regarded as an agreement to vary the contract by inserting in it a promise to indemnify if the statements contained in the proposal form are untrue, nor can the insurance company, in my judgment, be said to be estopped by the receipt of the premium from relying upon the contract under which the premium was paid. If it had not been for the decision of the Court of Appeal in *Bawden* v. *London, Edinburgh, and Glasgow Assurance Co.* (1) the appellants' case would have been unarguable. The present case is, in my judgment, distinguishable on its facts from *Bawden's* case (1), and is indistinguishable, so far as its material facts are concerned, from *Biggar* v. *Rock Life Assurance Co.* (2) In my judgment *Biggar's* case (2) and the cases which have followed it—*Levy* v. *Scottish Employers' Insurance Co.* (3) and the two

(1) [1892] 2 Q. B. 534. (2) [1902] 1 K. B. 516.
(3) 17 Times L. R. 229.

Scottish cases referred to by my Lord—were rightly decided. They are in agreement with the judgment of the Supreme Court of the United States in *New York Life Insurance Co.* v. *Fletcher* (1), and I think we ought to follow them notwithstanding the decision of the Court of Appeal in *Bawden's* case. (2) It is not easy to reconcile all that is said in *Bawden's* case (2) with the decision in *Biggar's* case (3), but it is to be observed that in *Bawden's* case (2) no attempt was made to use any part of the conversation between the plaintiff and the agent for the purpose of altering in any way the written contract. I think *Bawden's* case (2) is an application of the rule that in construing any written instrument, the Court is entitled to take into account the surrounding circumstances, and the surrounding circumstances may be such as to enable the Court to put a special meaning on the words used in the contract. If, for example, a contract is made on a market in which a dozen means thirteen, then the Court can construe the word "dozen" as meaning thirteen. In *Bawden's* case (2) it could not be disputed that the agent had authority to interview the proposing candidates for insurance, and when he took the plaintiff's signature to the proposal form, he knew, and therefore the company who had deputed him to see the plaintiff, can be deemed to have known, that they were making their contract with a one-eyed man. That being so, the Court seems to have considered itself in that case justified in putting on the words of the contract a meaning which was not their literal meaning, but which the Court considered was their reasonable interpretation as applied to a "one-eyed man." Lord Esher says (4): "the proposal must be construed as having been negotiated and settled by the agent with a one-eyed man," and (5): "Quin, being the agent of the company to negotiate and settle the terms of the proposal, did so with a one-eyed man. The company accepted the proposal, knowing through their agent that it was made by a one-eyed man, and they

(1) 117 U. S. 519.
(2) [1892] 2 Q. B. 534.
(3) [1902] 1 K. B. 516.
(4) [1892] 2 Q. B. 539.
(5) [1892] 2 Q. B. 540.

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issued to him a policy which is binding upon them, as made with a one-eyed man, that they would pay him 500*l.* if he by accident totally lost his sight, i.e., the sight of the only eye he had" and Lindley L.J. says (1): "The policy must, in my opinion, be treated as if it contained a recital that the assured was a one-eyed man." I think that case must be deemed to have been decided on the ground that the policy was interpreted as one effected with a one-eyed man, and that the agent, having authority to see the proposer and get a proposal form from him, the company was fixed with notice of what the agent saw at the interview. The case has been considered, and sometimes distinguished, and sometimes followed in cases before Courts of first instance, but in my judgment, it does not apply to the facts of the present case. As above indicated, I do not think it matters whether the directors are taken to have notice of what was said during the negotiations with Mr. Willey, the agent, but I also take the view that notice to the agent whose duty was to obtain a signed proposal form and send it to the company, was not notice to the company of anything inconsistent with the signed proposal form, and that in filling up the form, whether he mistook the instructions of the insured, or whether he intentionally filled in something different from what he was told, he was not acting as the agent of the company, but as the agent of the insured.

Of the numerous cases cited in the course of the argument of the appellants' counsel, only two beyond those I have already mentioned call for notice: *Wing* v. *Harvey* (2), a decision of the Court of Appeal in Chancery, and *Ayrey* v. *British Legal & United Provident Assurance Co.* (3) Both these cases are distinguishable from the present case. In *Wing* v. *Harvey* (2) the action was brought by the assignee of a policy against the defendant trustee of the Norwich Union Society. The policy contained the following condition: "If the party upon whose life the insurance is granted shall go beyond the limits of Europe, without the licence of the

(1) [1892] 2 Q. B. 540. (2) 5 De G. M. & G. 265.
(3) [1918] 1 K. B. 136.

directors, this policy shall become void: the insurance intended to be hereby effected shall cease, and the money paid to the society become forfeited to its use." After the assured had gone to live in Canada, the assignee on paying the premium to the agent, informed him that the assured had gone to Canada, and was then told that notwithstanding that fact, the policy would be perfectly good if the premiums were regularly paid. Thereafter the premiums were paid on the faith of the policy continuing valid and effectual notwithstanding the assured's departure for Canada. It will be seen here that no question could arise of varying the terms of the policy by words used in the course of the negotiations. The case is only an authority for the proposition that if an event has happened after the issue of the policy which would make the policy void, and the company with notice of the event which avoids the policy renews the contract by receiving the premium to cover a further period of insurance, it will be deemed to have effected the insurance on the term that the conditions will not be insisted on. It will be noticed that both Knight Bruce and Turner L.JJ. who decided the case thought there was sufficient evidence to justify them in coming to the conclusion that the directors had received from the agent notice of the fact that the assured had gone to live in Canada. They further held that even if the agent did not so inform the directors, the directors were bound by the receipt of the premium by their agent with knowledge of the forfeiture. In any case this decision has no application, except to a case where the alleged forfeiture arises out of facts happening after the issue of the policy.

In *Ayrey's* case (1) the plaintiff was the executrix of a man named Mackenzie, who was a fisherman. In Mackenzie's signed proposal form his occupation was stated as that of a fisherman. He was also a member of the Royal Naval Reserve Service, but this was not stated in the proposal form. He, however, communicated the fact verbally to the agent of the defendant company when the proposal form was signed. The agent referred the matter to one of the district

(1) [1918] 1 K. B. 136.

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superintendents, who was their district manager for the locality in question, and the latter saw the plaintiff and told her that the insurance money would be paid, although Mackenzie had gone mine sweeping. The question in the case was whether there had been concealment of a material fact. The proposal form contained a clause providing that if any information which ought to have been made known to the insurance company with reference to the insurance were withheld, the policy would become absolutely void. It was held by the Divisional Court, consisting of Lawrence and Atkin JJ., that the plaintiff was entitled to recover. Lawrence J. put his judgment on the ground that notice to the district manager was notice to the company, it being his duty to supervise the company's subordinate agents, and to be the means of communication between them and the head office, and on the ground that the receipt of the premiums by the district manager with full knowledge of the facts was a waiver by the company of the objection that there had been a concealment of a material fact. Atkin J. stated in his judgment that he was not satisfied that there had been any concealment, but that even if there had, the position had been set right by verbal communication to the district manager, who received the information as the authorized agent of the company, before any premium was paid, and that, having accepted the premium through their authorized agent, they could not then avoid the policy on the ground of concealment of a fact of which through their agent they had been informed. The case in my view only decides that where there is oral communication of the material facts to an agent of the insurance company authorized to receive it, there is no concealment. It does not seem to me to have any bearing on the point we have to decide in the present case.

I agree that this appeal should be dismissed with costs.

I have not thought it necessary to say anything on the difficult and very interesting question as to how far this Court is bound by its previous decisions; but I should like to point out this fact, that it has, at least on two occasions, sitting as a full Court, differed from a previous decision by

the same Court: and it seems to me that if that is right, it is equally right to say that, sitting with a quorum of three judges, it has exactly the same power as if it were sitting with six judges, though it would only be in most exceptional cases that those powers would be exercised.

RUSSELL L.J. I agree that this appeal fails. I have had the advantage of reading both the judgments which have been delivered by my Lords; I find myself in agreement with them, and am unable to add anything useful to them. In those circumstances I have not prepared any independent judgment.

Appeal dismissed.

Solicitor for appellants: *A. H. Freeman, for Hyman Stone, Sheffield.*

Solicitors for respondents: *Joynson-Hicks & Co.*

J. S. H.

C. A.
1929
May 13, 14.

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[1928. M. 3213.]

Husband and Wife—Deed of Separation—Maintenance—Husband's Covenant — Dissolution of Marriage — Operation of Covenant — Contract — Frustration.

By a deed of separation reciting that differences had arisen between a husband and a wife, it was agreed that the wife should during the life of the husband live separate and apart from him and free from his marital control and authority as if she were unmarried, and that the wife should retain as her separate property certain articles which, if she should die in the lifetime of the husband without having disposed of them, should devolve as if she had died possessed thereof intestate and a widow. The husband covenanted that he would during the life of the wife pay to her an annual sum of 600*l.* The wife was also to be entitled to certain furniture and effects for the use of herself during her life. Throughout the deed the parties were referred to as "the husband" and "the wife" respectively. It was provided that if the husband and the wife should be reconciled to each other and return to cohabitation the deed should become void.

The husband subsequently committed adultery and the wife obtained a decree dissolving the marriage. He then made default in paying the full annual sum provided for by the deed, and she brought an action to recover the arrears:—

Held, that the deed was not subject to any implied term that it should only operate so long as the marriage relation continued to exist between the parties, and that the plaintiff was entitled to recover.

Charlesworth v. *Holt* (1873) L. R. 9 Ex. 38 affirmed.

APPEAL from the judgment of Horridge J. in an action tried before the learned judge without a jury.

The action was brought by Christiane May, formerly the wife of John Johnston May, the defendant, to recover a sum of 50*l.* alleged to be due from the defendant to the plaintiff by the terms of a deed of separation made between the parties and dated April 12, 1916. The deed recited that unhappy differences had arisen between the husband and the wife by reason whereof they had agreed to live separate and apart from each other and to enter into the arrangement hereinafter expressed; and that there had been four children of the marriage of which the eldest was seven years old and the

youngest two years old. It then proceeded as follows (omitting formal parts) :—

" 1. The wife may and shall during the life of the husband live separate and apart from him and free from his marital control and authority as if she were unmarried.

" 2. Neither the husband nor the wife shall in any way molest or interfere with the other of them or shall require or by any legal proceedings for restitution of conjugal rights or otherwise howsoever attempt to compel the other of them to return to cohabitation.

" 3. The wife shall and may retain as her separate property and dispose of accordingly all articles of dress or personal use or ornament and all other tangible personal property now in her possession either as part of her paraphernalia or as her separate property and also all the real and all other personal estate to which she is now or shall hereafter become entitled in her own right And if she shall die in the lifetime of the husband without having disposed of such real and personal estate articles and property or any part thereof then the same or so much thereof as shall remain undisposed of at her death shall devolve and belong to the persons or person who would at her death have become entitled thereto by law had she died seised or possessed thereof intestate and a widow free from all right or claim of the husband his heirs executors or administrators.

" 4. The husband shall and will during the life of the wife so long as the wife shall perform and observe the stipulations on her part herein contained pay to the wife such an annual sum as after all deductions including income tax shall have been made shall amount to the clear yearly sum of 600*l.* to be considered as accruing from day to day but to be paid in advance on the first day of every month the first payment to be made on May 1, 1916."

[Clause 5 contained immaterial provisions.]

" 6. The wife shall be entitled to such of the furniture effects plate linen and other articles now in or upon the premises Castelnau, Martello Park," [Bournemouth] " as she may require . . . . for the use of herself during her life and the

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husband shall pay all the costs and expenses to be incurred in the removal of the same from the said premises to the new residence of the wife and the sum of 10*l.* towards the cost of installing the same therein. The husband shall also provide the wife with a piano for her use during her life.

" 7. The said children of the husband and wife shall remain in the sole custody and guardianship of the wife during their respective minorities and each of them the husband and the wife shall have the right at all times to communicate by letter with the children residing with the other of them and the right of access to such children at all convenient times and each of the said children shall be allowed to spend one half of their summer or winter holidays with the husband.

" 8. The wife shall out of the provision made for her by these presents provide a home for herself and the said children and in all respects support and maintain herself and the said children in the said home and pay for their education and also pay and discharge all debts engagements and liabilities whatsoever (whether arising from contract or from wrong) which she may incur or enter into and shall keep the husband his heirs executors and administrators indemnified from or against the same and all actions proceedings costs damages expenses claims demands and liability on account thereof.

" 9. If the husband and the wife shall be reconciled to each other and return to cohabitation then these presents shall become void.

" In witness," etc.

By a decree nisi pronounced at the instance of the plaintiff in 1923 and made absolute in 1924 the marriage between the parties was dissolved. On October 1, 1928, the defendant paid the plaintiff 25*l.* and no more of the 50*l.* payable under the deed ; and again on November 1, 1928, he paid only 25*l.* On November 7, 1928, the plaintiff issued a specially indorsed writ claiming 50*l.* The defendant contended that since the decree absolute the separation deed was no longer valid. The case was heard as a short cause before Horridge J. The learned judge gave judgment for the plaintiff.

The defendant appealed.

Hildesley K.C. and *Rowe* for the appellant. This case raises the point which was touched upon but left undecided in *Hyman* v. *Hyman* and *Hughes* v. *Hughes* (1)—namely, whether a separation deed in the ordinary form should be read as subject to the implied condition that it should cease to operate if the marriage between the parties should come to an end; or, to put the question in other words, whether *Goslin* v. *Clark* (2) and *Charlesworth* v. *Holt* (3) are still law. The question in *Hyman* v. *Hyman* (1) was not exactly that raised in this case; it was whether the petitioner who had covenanted in a separation deed not to apply for maintenance beyond the amount named in the deed, could, on the dissolution of her marriage, take proceedings for permanent maintenance under s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925. The full Court of Appeal by a majority of four to two decided that the covenant was no bar to the proceedings, on the ground that the agreement of the parties could not interfere with the discretion vested by the Legislature in the Court. If the decree of dissolution had put an end to the separation deed, that would have decided the case in favour of the petitioner, but none of the judges decided it on that point. That is the question raised in the present case. In the absence of a clear expression of opinion by the Court of Appeal, and in view of the decision of Lord Merrivale in *Reid* v. *Reid* (4), Horridge J. thought he was not justified in deciding contrary to *Goslin* v. *Clark* (2) and *Charlesworth* v. *Holt.* (3) But this Court can overrule those three cases, and it is submitted that it should do so. *Reid* v. *Reid* (4) stands or falls with the other two, as it is merely a statement of the practice in the Probate and Divorce Division based on *Charlesworth* v. *Holt.* (3) In 1873, when that case was decided, the doctrine of frustration of the adventure had not attained the importance which it acquired through an extended application of the principle of *Taylor* v. *Caldwell* (5) and *Appleby* v. *Myers* (6)—namely, that a contract may be

(1) [1929] P. 1, 21, 34, 76.
(2) (1862) 12 C. B. (N. S.) 681.
(3) L. R. 9 Ex. 38.
(4) [1926] P. 1.
(5) (1863) 3 B. & S. 826.
(6) (1867) L. R. 2 C. P. 651.

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subject to a condition, unexpressed but necessarily intended by the parties, that a certain state of things or a certain object shall continue to exist. The principle came into prominence in 1902, when the coronation of King Edward VII. had to be postponed, many contracts having been made on the understanding that it would take place on the day appointed; *Krell* v. *Henry* (1); *Chandler* v. *Webster* (2); and the principle was again widely invoked on the outbreak of the Great War, when the Government were obliged to commandeer vessels, large numbers of which were under charterparties: *Tamplin (F. A.) Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (3); *Bank Line, Ld.* v. *Arthur Capel & Co.* (4) The deed of separation in the present case was subject to the implied condition that the marriage relation should continue, and that if that relation ceased the effect of the deed should cease. This intention is to be gathered from the expressions used in the deed, "husband and wife," "marital control and authority," "conjugal rights," "separate property," and from the fact that throughout the deed the appellant is referred to as "the husband" and the respondent as "the wife": *In re Gilling; Procter* v. *Watkins.* (5)

[*Worsley* v. *Worsley* (6); *Clifford* v. *Clifford* (7); *Wasteneys* v. *Wasteneys* (8); and *Wootton-Isaacson* v. *Wootton-Isaacson* (9) were also cited.]

A. M. Sullivan K.C. and *Ralph Thomas* for the respondent were not called on.

SCRUTTON L.J. An action has been brought by a lady to recover sums due under a deed of separation executed by herself and her husband, from whom she has been divorced on account of his adultery. The deed was executed before the passing of the Matrimonial Causes Act, 1923, which enabled a wife to obtain a decree of dissolution on the ground of her husband's adultery without proof of other matrimonial

(1) [1903] 2 K. B. 740.
(2) [1904] 1 K. B. 493.
(3) [1916] 2 A. C. 397.
(4) [1919] A. C. 435.
(5) (1905) 74 L. J. (Ch.) 335.
(6) (1869) L. R. 1 P. & D. 648.
(7) (1884) 9 P. D. 76.
(8) [1900] A. C. 446.
(9) [1902] P. 146.

offence. It recites that unhappy differences had arisen between the parties and that there were four children of the marriage. Clause 4 of the deed provides as follows: [The Lord Justice read clause 4 of the deed, and proceeded:] When the decree of dissolution was pronounced, the plaintiff did not apply to the Court for an award of permanent maintenance, but relied on the terms of the deed. In October and November, 1928, the defendant paid only half of the amount he had covenanted to pay, and on November 7, 1928, the plaintiff issued a writ for two sums of 25*l.* which the defendant had omitted to pay. The defendant insisted that the deed was to be read, by reason of an implied term, as relating only to the period during which the parties were living apart as husband and wife, and that by virtue of the implied term it was to cease and become void if the relation of husband and wife came to an end by a decree dissolving the marriage; and this, say the husband's advisers, is the result whether the decree was pronounced in consequence of the act of the husband or that of the wife. The reason why this point, which might have arisen long ago, has been taken now for the first time is the decision of this Court in *Hyman* v. *Hyman* and *Hughes* v. *Hughes* (1) affirmed in the House of Lords. (2) The actual point raised in that case was different from that which we have to decide now. There was a separation deed containing a covenant by the wife not to sue for maintenance beyond the amount specified in the deed. The wife obtained a decree of dissolution of the marriage by reason of the husband's adultery. She then petitioned for permanent maintenance; the husband resisted the petition on the ground of the covenant in the separation deed; the wife replied that Parliament has conferred on the Court power to grant maintenance and that the jurisdiction of the Court in this respect cannot be ousted by the mere agreement of the parties. The full Court of Appeal by a majority of four judges to two upheld the wife's contention that the power of the Court was not ousted by the covenant. But in the course of the argument many other points were

(1) [1929] P. 1. (2) [1929] A. C. 601.

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considered. One of these was whether the doctrine of frustration operated to annul and avoid the deed when the relation of husband and wife came to an end and whether the husband was freed from the burden of his covenant; and *Charlesworth* v. *Holt* (1) was referred to. In that case there was a separation deed in which the husband had covenanted with trustees to pay an annuity for the support of the wife during the joint lives of the spouses and so long as they should live separate and apart. The marriage was dissolved on account of the wife's adultery. Thereupon it was argued that the deed had ceased to be operative. The Court of Exchequer decided that on the proper construction of the deed the termination of the matrimonial relation did not involve a termination of the effect of the deed. That case was considered by all the members of the Court of Appeal in *Hyman* v. *Hyman*. (2) Three members of the Court expressed doubts whether at the present day *Charlesworth* v. *Holt* (1) would be decided as it was in the year 1873. (3) The main decision in *Hyman* v. *Hyman* (2) was affirmed in the House of Lords (4), but again there are passages in the opinions of noble Lords which suggest that the House was not unanimously in favour of *Charlesworth* v. *Holt*. (1) In these circumstances it is not surprising that before long the question now in dispute should come up for consideration, or that when it did the husband should contend that the separation deed was subject to the implied term that it should only remain in force while the parties to it remained husband and wife; and that the wife should insist that there was no such implied term, and that *Charlesworth* v. *Holt* (1) ought to be followed. I have come to the conclusion that, whatever view this Court might have expressed if the question in *Charlesworth* v. *Holt* (1) arose for the first time now, when the doctrine of frustration has reached its present stage of development, the Court will not interfere with a decision which has stood so long and has been the foundation of so many deeds of separation between so many married couples.

(1) L. R. 9 Ex. 38.
(2) [1929] P. 1.
(3) [1929] P. 21, 22, 34, 35, 76.
(4) [1929] A. C. 601.

If the case had never arisen until now, there would have been a good deal of ground for saying that the deed made for the purpose of defining rights and obligations of two parties to a marriage was subject to the condition that the marriage should continue. "The doctrine of frustration" is used to express the principle on which a contract may be interpreted as impliedly subject to a defeasance if a certain state of things ceases to continue. "Frustration" is not an apt term to describe the principle. I take the explanation of it given by Lord Loreburn in *Tamplin (F. A.) Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (1) After saying that, unless some Act of Parliament gives the necessary jurisdiction, a Court of law has no power to discharge either party from the performance of a lawful contract where there is no default, Lord Loreburn continues: "But a Court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract. In applying this rule it is manifest that such a term can rarely be implied except where the discontinuance is such as to upset altogether the purpose of the contract." It is from this total frustration of the purpose of the contract that the doctrine derives its name. So where a hall was let for the purpose of giving a series of concerts and before the date fixed for the first concert the hall was burnt down, it was held that the contract was subject to an implied condition that the hall should continue to exist: *Taylor* v. *Caldwell.* (2) And where a landlord agreed to let rooms in Pall Mall to a tenant for two named days for the purpose of viewing the celebrations in connection with the coronation of King Edward VII., and the coronation was postponed owing to the illness of the King, it was held that the contract was subject to an implied condition that the celebrations should

(1) [1916] 2 A. C. 397, 403. (2) 3 B. & S. 826.

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take place on the days named: *Krell* v. *Henry*. (1) When the Great War broke out a number of ships were under voyage contracts and time charters; the Government stepped in and took control of the ships, and the question arose in many cases whether the particular charterparty was subject to a condition that the contract should continue to be capable of being performed. *Tamplin* (*F. A.*) *Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (2) and *Bank Line, Ld.* v. *Arthur Capel & Co.* (3) are instances of this. If the question in the present case had no previous history but had arisen for the first time after the decision of those cases, there would be much encouragement for the view that this husband and wife in providing the terms on which they should separate were providing for the time during which they should continue to be husband and wife, although separated, and on the footing that if they should cease to be husband and wife the operation of the deed should cease also. But the question is not whether they might, but whether they must have made their bargain on this footing. Can it be said that all husbands and wives who have executed deeds of separation must have made their bargains on the footing that the relation of husband and wife should in each case continue? Separation agreements have been drafted which provide that they shall continue valid although that relation should cease to exist. It is also the common practice for the Court in matrimonial cases to treat separation deeds as still existing when making a decree of maintenance or varying a settlement. Considering the number of years during which *Charlesworth* v. *Holt* (4) has stood for law, the number of separation deeds in existence, and the number of persons who are living under the provisions contained in them, I do not feel able to give effect to the doubt which I expressed in *Hyman* v. *Hyman* (5) and which I still entertain. Therefore, notwithstanding that doubt, I think this appeal must be dismissed.

GREER L.J. I agree. I have come to the conclusion that the judgment of Horridge J. was right. In my judgment

(1) [1903] 2 K. B. 740.
(2) [1916] 2 A. C. 397.
(3) [1919] A. C. 435.
(4) L. R. 9 Ex. 38.
(5) [1929] P. 34, 35.

we ought to hold ourselves bound by *Charlesworth* v. *Holt*. (1) I expressed this opinion in *Hyman* v. *Hyman* (2), although in that case it was not necessary to decide the point. In this case it is necessary to decide it. It is urged that we ought not to consider ourselves bound by *Charlesworth* v. *Holt* (1), because that case does not expressly deal with the doctrine of frustration; but though the doctrine is not mentioned in so many words, the reasoning of the Court of Exchequer excludes its application. The question was whether the deed in that case was subject to an implied term that the covenant to pay the annuity should only be binding during the continuance of the marriage tie. Kelly C.B. in giving judgment said (3): "I think the plaintiffs"—trustees of the deed—"are entitled to our judgment. The husband might, in this case, have introduced express words limiting his liability to the period during which Lucy Holt remained his wife. But there are no such words, and Mr. Holker has not satisfied me that any words are used which necessarily imply that the covenant is only to be binding during the continuance of the marriage tie. It is impossible for the Court to add such a term to the contract. If the contract were to be so construed, it would be possible for the husband, by giving grounds to his wife for a petition for divorce against him, to put an end to his liability. Suppose, for example, he were guilty of adultery and desertion, and the wife obtained a decree for dissolution, he would be freed by means of his own misconduct. We certainly ought not, unless constrained by express words or clear implication, so to interpret the contract." It is clear from that judgment that the Court were considering whether the term for which the defendant contended could be added to the contract. Bramwell B. said: "I am of the same opinion. Mr. Holker does not ask us to imply the condition he contends for, but to hold that the language of the deed itself in effect expresses that it is only to operate so long as the marriage remains undissolved. Now a man who becomes a party to such a deed as this, the

(1) L. R. 9 Ex. 38. (2) [1929] P. 68, 69.
(3) L. R. 9 Ex. 40.

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object of which is once for all to provide for the wife during the separation, could by unmistakeable words limit his liability to the period during which the marriage relation continues. Mr. Holker contends that the covenant is only operative as long as the parties live apart and the status of husband and wife exists between them. But I think the husband's covenant is absolute; and even in the case of the husband and wife resuming cohabitation, the trustees would be entitled to insist upon payment of the annuity were it not for the clause which limits the obligation to such time as they shall live apart from each other." Then after alluding to certain expressions in the deed, the learned Baron continues: "From these and other clauses it is plain that a divorce was not in the contemplation of either party; but I nevertheless see nothing to restrict the operation of the defendant's covenant, except the single condition that Lucy Holt and himself shall be living separate and apart." These expressions clearly indicate the opinion of the Court of Exchequer that the deed in *Charlesworth* v. *Holt* (1) was subject to no implied term which would bring its operation to an end if the relation of husband and wife should come to an end. The same consideration applies to the deed before us if, as I think, we are bound to follow the decision in *Charlesworth* v. *Holt*. (1) Apart from the length of time during which that case has stood unquestioned I say nothing as to how the question would be decided at the present day. The doctrine of frustration is not based on an addition by force of law to the obligations expressed in the contract. It rests on an implied term in the contract: see *Horlock* v. *Beale* (2) and *Tamplin* (*F. A.*) *Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (3)

RUSSELL L.J. I agree that the appeal fails. The success of the appellant's argument would involve the conclusion that every separation deed contains by implication a clause bringing to an end the operation of the deed in the event of divorce. This conclusion is inconsistent with *Goslin* v. *Clark* (4); *Charlesworth* v. *Holt* (1); and *Clifford* v.

(1) L. R. 9 Ex. 38.
(2) [1916] 1 A. C. 486.
(3) [1916] 2 A. C. 397.
(4) 12 C. B. (N. S.) 681.

Clifford (1); of these the first two decisions are not binding upon this Court, but the third is a decision of the Court of Appeal. The conclusion would be contrary to a long established practice of the Matrimonial Court of treating as subsisting any separation deed between the parties when exercising its jurisdiction formerly under s. 5 of the Matrimonial Causes Act, 1859, and now under s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925. Even if I thought the older decisions were of doubtful authority I should still be of opinion that we ought not to overrule them and interfere with the rights and liabilities of the parties to unnumbered separation deeds; but I do not wish to be taken as questioning the soundness and correctness of the old decisions.

Appeal dismissed.

Solicitors for appellant: *Gush, Phillips, Walters & Williams.*
Solicitors for respondent: *Cardew Smith & Ross.*

W. H. G.

THE KING *v.* NORTH WORCESTERSHIRE ASSESSMENT COMMITTEE.

1929
April 19, 22, 23.

Ex parte HADLEY.

Rating—Assessment Committee—Presence thereon of Members of Sub-Committee of rating Authority—Delegation of Powers of Authority—"Delegated"—Interest as "owner, occupier or otherwise"—"Or otherwise"—Writ of Prohibition to Assessment Committee—Rating and Valuation Act, 1925 (15 & 16 *Geo.* 5, *c.* 90), *Sch. I., Provisions* 5, 11, 12.

By provision 12 of Sch. I. to the Rating and Valuation Act, 1925: "No person who is a member of any committee to which the duties of the rating authority with respect to the preparation of the valuation list are delegated shall be qualified for appointment as a member of the assessment committee."

A rating authority had appointed a sub-committee to fix the values of properties in the district for the purpose of the preparation of the valuation list. They appointed P. and G. members thereof, and subsequently appointed the same two persons as their representatives on the respondent assessment committee. The applicant had given notice of

(1) 9 P. D. 76.

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objection to his assessment to the respondent committee, and, on learning the above facts, obtained a rule nisi for a prohibition to that committee from hearing and determining his objection:—

Held, that a writ of prohibition would lie to an assessment committee.

Held, further, that within the meaning of the above provision, the duties of the rating authority with respect to the preparation of the valuation list had been delegated to the sub-committee of which P. and G. were members, and that, consequently, they were disqualified from sitting on the assessment committee under the above provision 12, although at the time of their appointment thereto they were not disqualified.

By provision 11: "A member of an assessment committee shall not be qualified to act on the hearing or determination of or otherwise in connection with any matter relating to any hereditament in which he is interested as owner, occupier or otherwise."

Held, that P. and G. were not interested "otherwise," which refers to an interest ejusdem generis as that of an owner or occupier.

ORDER NISI for writ of prohibition.

The applicant, Hadley, was the owner and occupier of a dwelling-house at Halesowen in the county of Worcestershire. On November 2, 1928, he served on the clerk to the respondents, the North Worcestershire Assessment Committee, notice of objection to the assessment on the dwelling-house. He was not aware that at that time a Mr. Parsons and a Mr. Green, members of the sub-committee of the rating and valuation committee for Halesowen, appointed by the Halesowen Urban District Council, the rating authority, "to go through and fix the values of all properties for the purpose of the preparation of the valuation list in that urban district," which sub-committee had fixed the valuation of his house in the valuation list against which he was lodging notice of objection, were also members of the respondent assessment committee, having been appointed thereto by the Halesowen Urban District Council, the rating authority aforesaid, prior to their appointment on the said sub-committee. On discovering this fact the applicant applied for and obtained this rule to prohibit the respondent assessment committee from hearing and determining his objection, on the grounds: (1.) that the respondent committee was not constituted according to law, and (2.) that the said two members were disqualified from taking part in such hearing and determination under provision 12 of Sch. I. to the Rating and

Valuation Act, 1925. (1) In fact, two days after the rule had been granted the two members retired from the assessment committee.

Randolph Glen showed cause for the respondents. Prohibition is not the proper remedy, because the assessment committee have no power over their constituent representative members. The proper remedy is by quo warranto to these two members personally or else an injunction to restrain them from acting.

[*Everett* v. *Griffiths* (2) was referred to.]

The Halesowen council had not delegated its powers to the sub-committee within the meaning of provision 12 of Sch. I. to the Rating and Valuation Act, 1925, because they retained the final power over the assessments made by the sub-committee, and themselves made the valuation list. These two members were consequently not disqualified under the terms of that provision.

Scholefield K.C. and *C. Erskine Simes* showed cause for the Halesowen Urban District Council. Prohibition will not lie, because the writ only lies to an inferior Court which is usurping jurisdiction, and the assessment committee had jurisdiction to proceed with the assessment, and was under statutory obligation to do so. Provision 5 of Sch. I. to the Act of 1925 expressly enacts that the proceedings of the assessment committee shall not be invalidated "by any defect in the election, appointment or qualification of any member thereof," so that the jurisdiction of the committee was not taken away, even assuming that these two members were not qualified.

(1) Rating and Valuation Act, 1925 (15 & 16 Geo. 5, c. 90), Sch. I., provision 5: "The proceedings of an assessment committee shall not be invalidated by any vacancy among its members, or by any defect in the election, appointment or qualification of any member thereof."

Provision 11: "A member of an assessment committee shall not be qualified to act on the hearing or determination of or otherwise in connection with any matter relating to any hereditament in which he is interested as owner, occupier or otherwise."

Provision 12: "No person who is a member of any committee to which the duties of the rating authority with respect to the preparation of the valuation list are delegated shall be qualified for appointment as a member of the assessment committee. . . . ."

(2) [1924] 1 K. B. 941.

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In *Harries* v. *Crawfurd* (1) a clause—cl. 3 of Part B of Sch. I. to the Education Act, 1902 (2 Edw. 7, c. 42)—similar to provision 5 in the Act of 1925, was held to cover the irregularity in the appointment of three of the school managers in that case, and to render their action in dismissing a headmaster legal. There is a clear distinction between delegation of powers to another and a reference thereto. Delegation would mean the handing over the entire business to the sub-committee, which was not done in the present case. The effect of s. 1, sub-s. 3, of the Act of 1925, coupled with s. 56, sub-s. 1, of the Local Government Act, 1894 (56 & 57 Vict. c. 73), is that the rating authority may either delegate all their powers to a committee or may appoint a committee without delegating those powers, as have the council in the present case. "The duties" in provision 12 means all the duties.

[*Osgood* v. *Nelson* (2) was also referred to.]

At the time these two members were appointed they were clearly qualified, and therefore, even assuming that they would now be disqualified for appointment, they are not disqualified from continuing to act. The prohibition in provision 11 does not operate to prevent the members from acting, because they are not interested as owners, occupiers or otherwise, for the last words refer to an interest ejusdem generis as that of an owner or occupier.

[*Rex* v. *Beer* (3) and *Holden* v. *Southwark Corporation* (4) were referred to.]

Konstam K.C. and *Eales K.C.* in support. These two members are disqualified under provision 12 of Sch. I. to the Act of 1925. All the applicant is asking is that his objections should be heard before a properly constituted tribunal. These members would, in effect, be judges in their own cause. It is not necessary to show pecuniary interest or missionary zeal in them; it is sufficient to show interest: *Reg.* v. *Hertfordshire Justices.* (5)

(1) (1918) 16 L. G. R. 663.
(2) (1872) L. R. 5 H. L. 636.
(3) [1903] 2 K. B. 693, 696.
(4) [1921] 1 Ch. 550.
(5) (1845) 6 Q. B. 753.

[*Frome United Breweries Co.* v. *Bath Justices* (1) and *Reg.* v. *Lee* (2) were also referred to.]

If the applicant were driven to apply for a quo warranto the respondents would have the benefit of provision 5 of Sch. I. to the Act of 1925 (3), and, moreover, even if successful, the applicant could only have the members removed, and in the meanwhile his objections might have been dealt with.

Huth v. *Clarke* (4) shows that there can still be delegation, though the delegating authority can resume its powers at any moment. Delegation is not equivalent to resignation.

Prohibition will lie to this assessment committee, which performs quasi-judicial functions, having legal authority to determine questions affecting the rights of subjects: see per Atkin L.J. in *Rex* v. *Electricity Commissioners.* (5)

[*Rex* v. *Legislative Committee of the Church Assembly* (6) was also referred to.]

Scholefield K.C. in reply on the cases. The fact that these members may be said to have been judges in their own cause does not necessarily disqualify them. In *Frome United Breweries Co.* v. *Bath Justices* (1) the justices would not have been disqualified if they had not taken an active part by instructing a solicitor. In the Act of 1925 itself, for example, assessment committees adjudicate on objections to their own assessments: see ss. 17, 25, 26 and 27. The assessment committee is not a Court: *Reg.* v. *St. Mary Abbotts, Kensington, Assessment Committee* (7); *Gateshead Assessment Committee* v. *Redheugh Colliery.* (8) They only fix the figures; it is the Act of Parliament which imposes the obligation on the subject to pay.

[*Murray* v. *Epsom Local Board* (9) was also referred to.]

Randolph Glen referred to *Rex* v. *Sussex Justices. Ex parte McCarthy* (10) and *Rex* v. *Poole Corporation.* (11)

(1) [1926] A. C. 586.
(2) (1882) 9 Q. B. D. 394.
(3) Ante, p. 399, note (1).
(4) (1890) 25 Q. B. D. 391.
(5) [1924] 1 K. B. 171, 205.
(6) [1928] 1 K. B. 411.
(7) [1891] 1 Q. B. 378, 380.
(8) [1925] A. C. 309, 325.
(9) [1897] 1 Ch. 35.
(10) [1924] 1 K. B. 256.
(11) Unreported. See Glen's Public Health, 14th ed., vol. i., p. 1146. Cor. Lord Hewart C.J., Lush and Sankey JJ., November 8, 1923.

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April 23. LORD HEWART C.J. This is an order nisi for a writ of prohibition to prohibit the North Worcestershire Assessment Committee from hearing and determining an objection by one James Thomas Hadley to an assessment preferred in accordance with the Rating and Valuation Act, 1925, in respect of a dwelling-house situate within the urban district of Halesowen in the county of Worcester. The rule was granted upon two grounds: first, that the assessment committee was not constituted according to law, and, secondly, that two of its members, Mr. Parsons and Mr. Green, having been members of the sub-committee appointed to go through and fix the values of properties (including the property concerned in the particular objection) within the district of the urban district council of Halesowen, were disqualified from taking part in the hearing and determination by the assessment committee of that objection. That rule, it may be well to observe, was granted on January 28 last.

The facts of the case fall within a narrow compass and, are not seriously disputed. The applicant for the rule, Mr. Hadley, is the owner and occupier of a dwelling-house at Mucklows Hill within the urban district of Halesowen. On November 1 of last year he went to the rates office of the urban district council at Halesowen and there inspected the valuation list, which had been prepared in accordance with the Act of 1925. He found that the dwelling-house of which he was owner and occupier was assessed at a certain gross annual value and a certain rateable value, and, being minded to object to that assessment, he on November 2 last served upon the clerk to the North Worcestershire Assessment Committee notice of objection to his assessment. At the time when Mr. Hadley took those steps he was not aware of the state of facts of which, in applying for this rule, he complained. He was not aware that Mr. Parsons and Mr. Green, who were members appointed by the urban district council of Halesowen upon the North Worcestershire Assessment Committee, were also members of a sub-committee which had been appointed by the rating and valuation committee of the urban district of Halesowen—I employ the

words of the affidavit, which are not questioned—"to go through and fix the values of all properties for the purpose of the preparation of the valuation list for that urban district." As a matter of chronology it has been made clear in the course of the argument that the appointments really were made in the inverse order to that which might appear upon a hasty reading of the affidavit. The appointment, so far as these two gentlemen are concerned, which came first was their appointment by the urban district council of Halesowen to be members of the North Worcestershire Assessment Committee. It was only after that appointment, and while they held that official position, that the Halesowen Urban District Council, by its rating and valuation committee, appointed the same two gentlemen to be members of a small sub-committee, consisting of seven persons, for the purpose of going through and fixing the values of all properties for the purposes of the preparation of the valuation list for the Halesowen Urban District Council. What the applicant here seeks by this rule is to prevent his objection from being dealt with by the North Worcestershire Assessment Committee while that committee includes two representatives who, as members of this sub-committee, were directly responsible for fixing the assessment to which objection is being taken. The question for this Court is whether, in those circumstances, to which I must presently add another, it is right that the discretionary writ of prohibition should go.

It has been argued—a little late in the day, perhaps—that there is a short answer to the application—namely, that an assessment committee by its very nature is a body of a kind to which a writ of prohibition is not and will not be directed. That contention was founded upon some passages in the case of *Reg.* v. *St. Mary Abbotts, Kensington, Assessment Committee.* (1) That was a case in which a writ of mandamus was sought to compel an assessment committee, not indeed to hear and determine, but to hear a particular agent, and the decision was that, as the statute gave the objector the right to appear and be heard in support of his objections,

(1) [1891] 1 Q. B. 378.

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and contained no provision prohibiting him from appearing by an agent, the committee were bound to hear the agent, and that a mandamus must be granted. It was said by Pollock B. (1): "Looking at the position of the assessment committee, it appears that they have a duty imposed upon them to hear and determine objections to the valuation list; but in other respects there is no fair analogy to the position of a court." That was another way of saying that, to the extent to which the assessment committee had a duty to hear and determine objections to the valuation list, there was a fair analogy between it and a court. The rule for a mandamus having been made absolute, the assessment committee appealed, and in the Court of Appeal, where the appeal was dismissed, Lord Esher M.R. said (2): "The assessment committee have been called a court or tribunal, and spoken of as exercising judicial functions. They are a certain number of persons, in this case selected vestrymen, to whom power has been given by statute to hear objections, which have been made to the valuation list, and to decide whether such objections are well founded. I do not think that they are a court or a tribunal exercising judicial functions in the legal acceptation of the terms. The question here is whether, being such as they are, they have a right to say that a person may not appoint any agent he pleases to appear in support of an objection made by him to the list. There is, in my opinion, nothing in law which authorizes them to limit, as they have done, the rights of persons to whom the legislature has given the right of making objection to the list." In other words, if the assessment committee were a court or a tribunal exercising judicial functions in the legal acceptation of the term, the case would have been a fortiori, but the assessment committee being what it was, still it was right to compel it by mandamus to hear the particular person who was named. Now in my opinion the emphasis in that passage in Lord Esher's judgment is to be found in the words, "I do not think that they are a court or a tribunal exercising judicial functions in the legal acceptation of the terms," but

(1) [1891] 1 Q. B. 380. (2) [1891] 1 Q. B. 382.

nevertheless that does not make it untrue to say that, so far as they have a duty imposed upon them to hear and determine objections to the valuation list, there is a fair analogy between the position of the assessment committee and the position of a court. That judgment was delivered in the year 1891. Nearly ten years before that time—namely, in 1882—Brett L.J. (as he then was), in *Reg.* v. *Local Government Board*, said (1): "I think I am entitled to say this, that my view of the power of prohibition at the present day is that the Court should not be chary of exercising it, and that wherever the legislature entrusts to any body of persons other than to the superior Courts the power of imposing an obligation upon individuals, the Courts ought to exercise as widely as they can the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament." It is perhaps an under-statement to say that nothing has happened between the year 1882 and the year 1929 to make those observations of Brett L.J. less apt, less well founded, or less desirable to-day. And side by side with the judgment in the case of *Reg.* v. *St. Mary Abbotts, Kensington, Assessment Committee* (2) one may usefully set the judgments of the Court of Appeal in the case of *Rex* v. *Electricity Commissioners*. (3) Atkin L.J. (as he then was) giving judgment, said (4): "The question now arises whether the persons interested are entitled to the remedy which they now claim in order to put a stop to the unauthorized proceedings of the Commissioners. The matter comes before us upon rules for writs of prohibition and certiorari which have been discharged by the Divisional Court. Both writs are of great antiquity, forming part of the process by which the King's Courts restrained courts of inferior jurisdiction from exceeding their powers. Prohibition restrains the tribunal from proceeding further in excess of jurisdiction; certiorari requires the record or the order of the court to be sent up to the King's Bench Division, to have its legality inquired into, and, if necessary, to have the order quashed.

(1) (1882) 10 Q. B. D. 309, 321.
(2) [1891] 1 Q. B. 378.
(3) [1924] 1 K. B. 171.
(4) Ibid. 204.

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It is to be noted that both writs deal with questions of excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a Court of Justice. But the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognized as, Courts of Justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs." Applying that canon to the position and duties of an assessment committee, I think that an assessment committee satisfies both tests. It is in my opinion a body of persons having legal authority to determine questions affecting the rights of subjects, and, secondly, to the extent to which it has and is performing that duty, it has, I think, the duty to act judicially. In a proper case, therefore, as it seems to me, a writ of prohibition might be directed to an assessment committee, and it is not correct to say that by its very nature, position, and scope, an assessment committee is outside the area of bodies to whom a writ of prohibition may properly be directed. The question, therefore, is whether in these circumstances a writ of prohibition should be directed to this assessment committee.

The main argument, certainly in point of time, and, I think, the first in point of substance, on behalf of the Halesowen Urban District Council, was one based upon Sch. I. to the Rating and Valuation Act, 1925. That Schedule contains a series of provisions with respect to assessment committees, and the fifth of those provisions is in these terms : " The proceedings of an assessment committee shall not be invalidated by any vacancy among its members, or by any defect in the election, appointment or qualification of any member thereof." But when one turns to provision No. 12, one finds these words : " No person who is a member of any committee to which the duties of the rating authority with respect to the preparation of the valuation list are delegated

shall be qualified for appointment as a member of the assessment committee." The argument founded upon those two provisions took more than one form. In the first place it was urged that the two gentlemen appointed here to the assessment committee did not come within the words " member of any committee to which the duties of the rating authority with respect to the preparation of the valuation list are delegated." It was said that the expression " are delegated " in that provision means that the whole duties from beginning to end, from alpha to omega, are handed over to the committee, while in this case, although no doubt the committee was appointed to go through and fix the value of all properties, there never was a time when the council had not its hand upon at any rate the ultimate decision of the matter. In my opinion there is nothing in that argument. I need not refer to the series of cases to which the attention of the Court has been directed, upon the true meaning of " delegation " in such a context as this. It seems to me to be clear that there was a substantial delegation of duties with respect to the preparation of the valuation list to the sub-committee of which these two gentlemen were undoubtedly members, and that that circumstance was enough to bring them within the disqualification referred to in provision 12.

But it was then said that, even though that should be so, what followed was a disqualification for appointment, a disqualification at the outset, not a disqualification invalidating the appointment after it had been made or preventing the holder of that appointment from continuing to fulfil or to purport to fulfil its duties ; and our attention was directed to statutes which have contained provisions disqualifying persons in certain cases from being elected to, or from being in, or from holding particular positions or offices. In my opinion the argument fails. I think on a fair construction of this provision what is meant by the Legislature is that a person who is a member of any such committee to whom duties of the kind referred to have been delegated, is not qualified to sit as a member of the assessment committee.

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A further argument of a subsidiary kind was based upon provision 11, and there, as it seems to me, Mr. Scholefield is right. Provision 11 says: "A member of an assessment committee shall not be qualified to act on the hearing or determination of or otherwise in connection with any matter relating to any hereditament in which he is interested as owner, occupier or otherwise." In my opinion, the words "or otherwise" in that context are not wide enough to cover such an interest as may be said to arise in a person because he has been or is a member of a particular committee. I think that the interest which is there referred to is an interest ejusdem generis with the interest of an owner or occupier. To that extent it seems to me the argument is sound.

But if this construction of provision 12 is right, what is its practical effect when it is compared with provision 5, which says: "The proceedings of an assessment committee shall not be invalidated by . . . . any defect in the election, appointment or qualification of any member thereof"? The argument was that, as the proceedings of the committee are not invalidated by a lack of qualification in its members, therefore it matters not whether those members are or are not disqualified. With all due respect to that argument, it seems to me that the real force of it is the other way round: it is an additional reason why persons who are disqualified should not sit, that if they do sit, the proceedings of the committee cannot be invalidated by reason of their presence. The fact that the act, if it be done, cannot be invalidated by reason merely of lack of qualification in some members of the acting body seems to me to be a good reason why that body, in which there is that lack of qualification, should be prevented, if possible, from doing the act. Believing, then, as I believe, that these two gentlemen were disqualified, and ought not to be upon this assessment committee, I think that if they acted upon that committee as members, the consequences to the committee might be serious indeed.

Reference has been made to the cases of *Reg.* v. *Lee* (1) and *Reg.* v. *Hertfordshire Justices.* (2) Lord Denman C.J.

(1) 9 Q. B. D. 394. (2) 6 Q. B. 753, 756.

said in the latter case (1): "Both these gentlemen had a disqualifying interest. Mr. Fitzjohn, as a creditor, had an interest in the funds of the trust to which the money was to be paid. It is contended that, as the majority, without reckoning his vote, was in favour of the confirmation, the order is not vitiated. But, after making every possible deduction from the strength of my opinion, in deference to that of my brother Patteson, still in my judgment a decision is vitiated by any one interested person taking part in it. We cannot enter into an analysis of the different motives which may have produced the decision: it is enough to say that a single interested person has formed part of the Court." And Coleridge J. said (2): "Whether there is a properly constituted Court, is a question which must be prior to the decision." Now, if that be so, this assessment committee, while it contained as representatives from the Halesowen district these two gentlemen who had been members and, for aught I know, still were members of the sub-committee that went through and fixed the values of the properties at Halesowen, was, it seems to me, to that extent improperly constituted. Of the probable dimensions of the mischief it is not necessary to form even a conjecture, but one would naturally suppose that in such a body, when hereditaments from Halesowen were being considered, the natural and ordinary course for the other members of the assessment committee would be to pay great attention to what was said by the representatives from Halesowen itself, who would bring to the committee a particular and, it might be, valuable local knowledge; and if those gentlemen came there with their minds already made up, firmly and conscientiously believing that the valuation at which they had arrived as members of the sub-committee was the true valuation, it needs but very little imagination to perceive that their weight and influence upon the assessment committee might be great indeed. But it is not necessary to enter into speculations of that character. It seems to me that the committee was

(1) 6 Q. B. 753, 756. (2) 6 Q. B. 758.

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in this position: that it had upon it as members persons who for good reason ought not to be there.

If the matter had rested there, I should have thought that there was little or no answer to the application for this rule, but in fairness it is necessary to see what in fact took place. This rule was obtained, as I have said, on January 28 of this year. There are exhibited to the affidavit of Mr. George Francis James, the gentleman who at all material times was the clerk to the North Worcestershire assessment committee, the minutes of the relevant meetings. It appears from those exhibits that there was a meeting of the committee on Tuesday, January 29, of this year, that is to say on the day following the day upon which this Court had granted the rule. It is apparent from the minutes that both Mr. Parsons and Mr. Green were present, and were present as coming from the Halesowen Urban District Council, and the chairman pointed out that a rule nisi had been granted to restrain, as it was put, two members of the Halesowen rating authority from acting on the committee, and the clerk read a report of the proceedings and expressed his opinion that, if the members affected acted after being aware of those proceedings, they might be committing contempt of Court. Thereupon the chairman of the committee advised the members affected not to sit, and after some demur those members withdrew; and in like manner, on January 30, 1929, the following day, as soon as a quorum could be formed, the minute says: The clerk to the Halesowen rating committee "desired to be informed whether the representatives of his authority would be allowed to act, and stated that at the meeting held on the previous day those gentlemen had been told they would not be permitted to act," and thereupon—and I deliberately read this passage complete from the minutes—"the chairman stated that at the Oldbury meeting these gentlemen were informed that according to the newspapers an injunction" —that was an inaccuracy—"had been obtained to restrain two representatives of the Halesowen rating authority from hearing certain objections and adjudicating thereon. He had advised that under the circumstances the Halesowen

members should not act, and was of opinion that, apart from incurring personal liabilities, the proceedings of the committee might be invalidated." The clerk to the assessment committee had supported this view. The chairman went on to say that he was still of opinion that the Halesowen members were in the circumstances debarred from acting, and after that controversy the gentlemen referred to, having made a protest, left the room. The officials also withdrew, and for a moment there was a refusal on the part of the officials to act unless the members coming from that urban district also took part in the proceedings. But that matter was solved or at any rate dealt with by the decision of the committee to adjourn and consider the question. So the matter then stood, and we are told that since that time—namely, on April 16 last—these two gentlemen have ceased to be members of the committee.

Now in dealing with this question, one must have regard primarily to the state of affairs which existed at the time when the rule was granted, and I am far from suggesting that, as matters then stood, Mr. Hadley was not within his rights in seeking the remedy of prohibition. On the other hand, one has also to remember that this Court does not assume that a body will act in excess or usurpation of jurisdiction, unless the evidence points clearly in that direction, and we know now that, as soon as the matter was brought to the notice of the assessment committee, that committee was diligent to prevent the happening of the mischief against which the rule is directed, and in fact its action prevented any adjudication upon Mr. Hadley's objection by a committee containing these members of the Halesowen sub-committee. I think that these are circumstances very material to be considered when the question is whether the discretionary writ of prohibition shall be issued. Looking at all the circumstances of the case, and not least at the attitude which has been observed by the assessment committee, although I am clearly of the opinion that in a proper case a writ of prohibition might go to an assessment committee, I have come to the conclusion that this rule ought to be discharged.

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But that is not quite the whole of the matter. The culprits here, if I may use that expression in no offensive sense, are the Halesowen Urban District Council, who appointed to their sub-committee with the important task of going through and fixing the valuation of the properties in the Halesowen district, two gentlemen who, as they well knew, had been appointed in the previous month of April to be the representatives of that urban district council, itself the rating authority in that neighbourhood, upon the North Worcestershire assessment committee. It is, I think, that conduct on the part of the Halesowen Urban District Council which has given rise, and necessarily given rise, to the present controversy and to the expense of this litigation. I think, therefore, that the Halesowen Urban District Council ought to pay not only its own costs but also the costs of the applicant and the costs of the assessment committee. Subject to that stipulation as to costs, I think that this rule ought to be discharged, it being clearly understood that these two gentlemen are disqualified and ought not to be reappointed for this purpose.

AVORY J. I concur in the judgment which has just been delivered by my Lord. In my opinion, these two gentlemen, Mr. Parsons and Mr. Green, were disqualified from sitting upon the assessment committee for the purpose of hearing and determining the objection made by the present applicant, Mr. Hadley, to the assessment of his property, which was situate within the urban district of Halesowen, and I think that they were so disqualified by virtue of provision No. 12 in Sch. I. to the Rating and Valuation Act, 1925. They were in fact appointed in April of 1928, and in July of 1928 they were constituted members of a sub-committee to assist in the preparation of the valuation list for the Halesowen district. It is said that at the time of their appointment there was no disqualification of them. That is literally true, but provision No. 12 is in these words: "No person who is a member of any committee to which the duties of the rating authority with respect to the preparation of the valuation list are delegated shall be qualified for appointment

as a member of the assessment committee," and it is argued that, because these gentlemen were at that time, in April, not disqualified for such appointment, therefore they were not disqualified from acting as members thereof, although in the meantime they had been made members of the sub-committee; and it is further argued that in fact this provision means that all the duties of the rating authority with respect to the preparation of the valuation list must be delegated before any such disqualification can arise. I do not agree that the words "the duties of the rating authority" mean all the duties, that is, including the duty of finally fixing the assessments in the valuation list. In my opinion these gentlemen were members of a "committee to which the duties of the rating authority with respect to the preparation of the valuation list are delegated," and I am confirmed in the view that the duties were delegated, by the decision of Lord Coleridge C.J. and Wills J. in the case of *Huth* v. *Clarke* where Lord Coleridge said (1): "delegation does not imply a denudation of power and authority"; and Wills J. said (2): "Delegation, as the word is generally used, does not imply a parting with powers by the person who grants the delegation, but points rather to the conferring of an authority to do things which otherwise that person would have to do himself." And he says later that the word "is never used by legal writers, so far as I am aware, as implying that the delegating person parts with his power in such a manner as to denude himself of his rights. . . . . The word 'delegate' means little more than an agent. The notion, therefore, that the use of the word 'delegate' implies that the executive committee parted with their own authority is misconceived." But, while it is quite true that in this case the rating authority did not part with their own authority, but reserved to themselves the power of revision of anything done by this sub-committee, in my opinion nevertheless the duties of the rating authority with respect to the preparation of that list were in fact delegated to this sub-committee; and if that is so, particularly in view, as my Lord has pointed out, of the effect of provision 5

(1) 25 Q. B. D. 391, 394. (2) 25 Q. B. D. 395.

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in Sch. I., which says that the proceedings of an assessment committee shall not be invalidated by any defect in the qualification of any member, I cannot impute to the Legislature an intention, in saying that a person shall not be qualified for appointment as a member of the assessment committee, that he shall be, although he becomes disqualified from acting, nevertheless entitled to act if he can show that at the date of his appointment he was not disqualified. I think the effect of provision 12 is to say that a person who is not qualified for certain reasons for appointment shall not be qualified to act on the assessment committee.

That being so, if it appeared to this Court that the assessment committee in question contemplated sitting to hear and determine this objection with either of these two gentlemen upon it at the time, or with any other person appointed who was not qualified or who was disqualified for any reason, then I think that this rule ought to be made absolute. But the fact appearing that the assessment committee never contemplated so doing, and in fact did all that was reasonably possible to prevent these two members from taking part in the hearing of this objection, I agree that in those circumstances it would not be right to make the rule absolute, and in view of the fact that the whole of this trouble has arisen from the persistence on the part of these members of the Halesowen Urban District Council in claiming the right to sit and adjudicate upon this objection, I agree with what my Lord has said should be the order of this Court as to costs.

I wish to add one word with regard to a point which has been argued at considerable length—namely, whether, apart from the provisions of Sch. I. to the Rating and Valuation Act, 1925, an objection might properly be taken to these two gentlemen sitting upon the assessment committee to hear this objection on grounds which are called common law grounds as distinct from any statutory provision. I do not think it necessary to express an opinion upon that point, and I reserve it, particularly in view of the peculiar constitution of the assessment committee and the powers which are entrusted to it under the Act of 1925, as they were entrusted to an

assessment committee under the old Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), looking particularly at s. 27, sub-s. 2, of the former Act, which provides that "On their revision of the draft list the assessment committee may, subject to the provisions of this Act, make such alterations, insertions and corrections in the list, whether for the purpose of meeting an objection or for any other reason as they think proper." In view of the fact that they may make those alterations, and would of necessity themselves have afterwards to decide upon any objection which might be made to their own alterations, it seems to me that there might be a difficulty in holding that members of that assessment committee were disqualified on the grounds which are commonly described as common law grounds of bias. Therefore I prefer to rest my judgment, as I have done, upon the statutory provisions contained in Sch. I. to the Act of 1925.

SWIFT J. I agree that these two gentlemen were disqualified by provision 12 and ought not to have sat upon that assessment committee. I think that apart from provision 12 it may well be that they were disqualified at common law, having themselves fixed the valuation of the hereditaments to which valuation objection was being made, but I do not think it necessary to decide that point in this case, and, for the reasons given by my Lord and by Avory J., and apart from the question of the common law disqualification, I entirely agree with the result which has been arrived at.

Solicitors for assessment committee: *Gibson & Weldon, for G. F. James, Stourbridge.*

Solicitors for urban district council: *Dennison, Horne & Co., for E. H. Grove, Halesowen.*

Solicitors in support: *Church, Rendell, Bird & Co., for Talbots, Birmingham.*

W. L. L. B.

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April 23, 24.

THE KING *v.* NEWPORT (SALOP) JUSTICES AND OTHERS.

Ex parte WRIGHT.

Justices—Information for alleged Assault—Dismissal of Information—Application by Prosecutor for Case stated—Jurisdiction of Justices to state Case—Jurisdiction of High Court to order Justices to state Case—Summary Jurisdiction Act, 1857 (20 & 21 *Vict. c.* 43), *s.* 2—*Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 33.

Where an information for a criminal offence has been dismissed by a court of summary jurisdiction, that court has jurisdiction, on the application of the unsuccessful prosecutor, to state a case on a question of law, and in the event of its refusal the High Court has jurisdiction to compel it to do so.

Davis v. *Douglas* (1859) 23 J. P. 135.

Education—School—Schoolmaster—Implied Authority to make and enforce Rules—Extent of Authority—Rule prohibiting Smoking on School Premises or in Public—Pupil smoking after School Hours in Public Street—Alleged Breach of Rule—Corporal Punishment—Reasonableness.

At a school for boys there was a rule prohibiting smoking by pupils during the school term whether on the school precincts or in public. During the term a pupil rather less than sixteen years old, after having left the school for the day and returned home, smoked a cigarette in the public street, and next day the schoolmaster administered to him five strokes of the cane as a punishment for breach of the rule. On the hearing of an information against the schoolmaster for an alleged assault on the boy the justices found that the rule in question was reasonable, that the father of the boy by sending him to the school authorized the schoolmaster to administer reasonable punishment to the boy for breach of a school rule, and that the punishment administered was reasonable; and they dismissed the information. An order nisi having been obtained calling upon the justices to show cause why they should not state a case on a question of law:—

Held, that the decision of the justices was right, that no question of law arose on which they could state a case, and that the order nisi should be discharged.

Cleary v. *Booth* [1893] 1 Q. B. 465 and *Mansell* v. *Griffin* [1908] 1 K. B. 160, 947, principles applied.

ORDER NISI for a mandamus.

Mr. Ernest James Wright was the proprietor of a picture house and garage at Newport, in the county of Salop, and his son, Frank Douglas Wright, was a pupil at the Newport Grammar School.

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On December 6, 1928, the boy Wright, who was then a little under sixteen years of age, left the school at 3.30 P.M. and went to the picture house with another pupil named Williams. A man at the picture house gave each of the boys a cigarette, and they walked down the street smoking the cigarettes. When the two boys went to the school the next morning, Mr. Walter Samuel Brooks, the headmaster, asked them in the presence of about seventy other boys if they had smoked in the street on the previous day. On the two boys admitting that they had done so the headmaster, with the help of Mr. Harman and Mr. Lowe, two assistant masters, caused each of the two boys to bend over and administered to each of them five strokes of the cane. The headmaster then made the two boys apologise to the other boys for what they had done.

Mr. Wright, senior, for and on behalf of his son, laid an information against the headmaster and the two assistant masters for that they on the occasion mentioned did unlawfully assault and beat the boy Wright. On January 8, 1929, the information was heard by five justices for the county of Salop sitting as a petty sessional court at Newport.

On the hearing of the information the boy Wright stated in evidence that he had been attending the school for the previous five years as a day scholar, and that he had never seen any rule of the school about smoking. Mr. Wright stated that on December 7, after his son had complained to him about having been whipped, he went at once to the school and saw the headmaster, that the headmaster said that the boy had broken a rule of the school, that the headmaster on being asked to produce the rules of the school said that he had not any printed rules, and that he (Mr. Wright) said that the boy was smoking with his consent, but that if he had known that it was a school rule not to smoke he would not have allowed it. Mr. Brooks stated that he had been headmaster of the school for two years, that he had from time to time addressed the boys as to their proper conduct in the school and in the streets, and as to their general behaviour including smoking, and that on being

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spoken to by Mr. Wright he told him that the school authorities did not print rules of common decency and conduct. The two assistant masters also gave evidence. The justices having heard the evidence dismissed the information.

An application in writing dated January 14, 1929, was made by Mr. Wright to the justices, in which he stated that he, being dissatisfied and aggrieved with their determination as being erroneous in law, thereby pursuant to the Summary Jurisdiction Acts, 1857 and 1879, applied to the justices to state a case setting forth the facts and grounds of their determination. By their certificate dated January 22, 1929, the justices certified that they were of opinion that the application was merely frivolous, and they refused to state a case accordingly.

In support of his application for the order nisi mentioned below Mr. Wright made an affidavit in which he stated that he had given his said son permission to smoke cigarettes, that he had no knowledge of the unwritten rule of the school against smoking, and that he believed that the evidence given by his son before the justices to the effect that he had no knowledge of the rule was true ; that it was contended before the justices on his behalf that the defendants had no authority or jurisdiction over the boy Wright at the time when he smoked the cigarette and had no right to inflict corporal punishment upon him for doing so, and that it was further contended on his behalf that it was a question of law whether the defendants had that authority, jurisdiction, or right or not.

On February 14, 1929, Mr. Wright obtained in the High Court an order nisi calling upon the justices and Mr. Brooks and the two assistant masters to show cause why the justices should not state a case, the grounds of the order nisi being that the justices were wrong in law in holding that the head-master and assistant masters had authority and/or jurisdiction to inflict corporal punishment on the boy Wright, that at the time of committing the act complained of the boy Wright was in the control and under the authority of his father, and that the act in respect of which the defendant

masters inflicted punishment upon the boy Wright was committed by him by permission of his parent, and that therefore the defendants had no authority to inflict the said punishment. Notice of the order nisi was given to the justices and to the three masters.

On March 16, 1929, the justices made an affidavit in answer to the order nisi. They stated that after hearing the evidence they found the facts to be that there was at the school a rule prohibiting smoking by pupils during the school term whether on the school precincts or in public; that that rule was a reasonable and disciplinary rule; that the boy Wright was aware of the rule and deliberately broke it; that the corporal punishment administered was a reasonable and proper punishment for the breach of the rule and reasonably and properly administered; and that the father of the boy by sending him to the school authorized the schoolmaster to administer reasonable punishment to the boy for breach of a reasonable school rule. They further stated that they refused to state a case for the following reasons: that counsel for the prosecution in his opening statement had said that even if the justices held that the schoolmaster had jurisdiction over the boy after school hours, which he was not prepared seriously to contest, the punishment was not justified; that the question of the schoolmaster's jurisdiction was never seriously argued and that the case and complaint proceeded throughout upon the footing that the punishment was in fact unreasonable, excessive and unreasonably administered: that no one appeared in support of the application for a case to be stated; and that that application disclosed no point of law on which the justices were asked to state a case.

Ronald Walker, for the justices, showed cause. There is a preliminary objection to the making absolute of this rule nisi—namely, that here the justices have no jurisdiction to state a case and this Court has no jurisdiction to compel them to do so. The right of appeal from a court of summary jurisdiction by special case is now regulated

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by the Summary Jurisdiction Act, 1879, s. 33, and under that section only a person who is "aggrieved" by the determination of a court of summary jurisdiction may apply to that court to state a case or to the High Court for an order requiring a case to be stated. Where an information for an indictable offence has been dismissed by a court of summary jurisdiction, the unsuccessful informant is not a person "aggrieved" within the meaning of that section, and there is no jurisdiction thereunder in that court to state a case or in the High Court to compel it to do so: *Foss* v. *Best* (1) and *Stokes* v. *Mitcheson.* (2) The information which the present applicant laid before the justices having been for an indictable offence—namely, an assault, and having been dismissed by the justices—it therefore follows that he cannot under that section appeal from their decision by case stated. It is true that the Summary Jurisdiction Act, 1857, s. 2, provides that either party to a proceeding before justices may, if "dissatisfied" with their determination as being erroneous in point of law, apply to the justices to state a case under that Act; but by s. 33, sub-s. 2, of the Act of 1879, the Act of 1857 is only to apply to a case stated under the Act of 1879 so far as it is applicable. Sect. 33 of the Act of 1879 is the prevailing enactment, and a party dissatisfied under the Act of 1857 cannot require a case to be stated unless he is a party aggrieved under the Act of 1879. It is contrary to the policy of the law that the unsuccessful prosecutor should be permitted to appeal against the acquittal of the defendant, thereby placing the latter again in jeopardy in respect of the same charge, and on that ground also this application ought to be refused: see *Reg.* v. *Keepers of the Peace and Justices of the County of London.* (3) In any case, this Court has a discretion whether or not it should order the justices to state a case, and in the circumstances of the present case it should in its discretion refuse to order them to do so. There is another ground also for saying that there is no jurisdiction to state a case. The information was laid under the Offences

(1) [1906] 2 K. B. 105. (2) [1902] 1 K. B. 857.
(3) (1890) 25 Q. B. D. 357.

against the Person Act, 1861, s. 42 or s. 43, for an assault. Sect. 44 of the Act provides that if the justices upon the hearing of any such case of assault under either of the last mentioned two sections shall dismiss the complaint they shall make out a certificate of dismissal and deliver it to the defendant, and s. 45 provides that if the defendant shall have obtained such a certificate he shall be released from all further or other proceedings civil or criminal for the same cause. In the present case, when the justices dismissed the information against the defendants for the alleged assault they became bound, under s. 44, to deliver to each of them a certificate of dismissal, which under s. 45 would release him from all further proceedings for the same cause, including an appeal. In view of the fact that the defendants are entitled to certificates of dismissal under these provisions, there is therefore no jurisdiction to state a case at the request of the applicant.

As to the merits, this Court ought not to order the justices to state a case in the present instance, because no question of law here arises. The propositions are well established in law that a parent who sends his child to a school authorizes the schoolmaster to make reasonable rules for the regulation of the school, and to administer to the child for breach of these rules reasonable and moderate corporal punishment, and further that the rules are not unreasonable merely because they may extend beyond the actual precincts of the school: *In re Basingstoke School* (1); *Cleary* v. *Booth* (2); and *Mansell* v. *Griffin.* (3) It further appears from the authorities just cited that the questions whether a particular rule of the school is reasonable, whether a particular person has authority to punish the child for breach of the rule, and whether the punishment administered is reasonable, are all questions of fact for a court of first instance. In the present case the justices in their affidavit have indicated the view which they took of the law, and have set out their findings of fact, which include findings that the

(1) (1877) 41 J. P. 118. (2) [1893] 1 K. B. 465.
(3) [1908] 1 K. B. 160, 947.

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rule in question was reasonable, that the schoolmaster had authority to administer reasonable punishment for breach of the rule, and that the punishment administered was reasonable. The justices took the correct view of the law already referred to, there was evidence to support all their findings of fact, and in arriving at their decision they properly applied the law to the facts found. No question of law therefore arises on which the justices can state or can be required to state a case, and this rule should be discharged.

J. L. Pratt, for the applicant, in support of the rule. The preliminary objection cannot be sustained. There is jurisdiction in the justices to state a case on the request of the present applicant, and in this Court to order them to do so. The Summary Jurisdiction Act, 1857, s. 2, provides that either party to a proceeding before justices may, if "dissatisfied" with their determination as being erroneous in law, apply for a case to be stated. The Summary Jurisdiction Act, 1879, s. 33, sub-s. 1, no doubt provides that any person "aggrieved" who desires to question the determination of a court of summary jurisdiction may apply for a case to be stated. It appears, however, from sub-s. 2 of the last mentioned section that that section does not supersede the provisions of the Act of 1857, but that they remain in force. The two enactments apply to different cases and are in no way inconsistent with each other. Either party, and therefore an unsuccessful prosecutor, may be "dissatisfied" with the determination of the justices under the earlier Act, without necessarily being aggrieved under the later Act. Under the Offences against the Person Act, 1861, s. 42, an information for an alleged assault may be laid not only by the person aggrieved, but by some one on his behalf, and that section therefore contemplates that in a case such as the present proceedings may be taken by a person even though he is not "aggrieved." In *Foss* v. *Best* (1) the actual decision was limited to the point whether service of the case had been effected, and it was stated that the point as to the jurisdiction of the justices to state a case did not arise. In that

(1) [1906] 2 K. B. 105.

case *Stokes* v. *Mitcheson* (1) was not cited. The latter case shows that, in order to entitle a person to require the justices to state a case, it is sufficient for him to bring himself within either the Act of 1857 or the Act of 1879. As regards the other point taken in support of the preliminary objection, it is irrelevant to say that if the defendants had obtained a certificate of dismissal under s. 44 of the Act of 1861, they would by s. 45 have been released from all further or other proceedings for the same cause, because there is no evidence that the defendants ever in fact obtained any such certificate. Further, even if the defendants had obtained a certificate it would not avail them, because under s. 45 a person getting the certificate is only protected against new proceedings for the same cause and not against an appeal in proceedings already taken.

As to the merits, there is a question of law on which the justices should state a case. It is not disputed that it is settled law that a parent who sends his child to school gives the schoolmaster authority to make proper and reasonable rules for the school and to administer reasonable punishment to a pupil who breaks these rules. The authority which the parent gives to the schoolmaster may not however be expressly defined, and a further question of law then arises—namely, what is the extent of the authority? In that case the extent of the authority is an inference of law to be drawn from the act of the parent in sending the child to the particular school. In the present case the extent of the schoolmaster's authority was not precisely defined. It was not conferred upon him by any special contract between him and the father of the boy. There was no evidence before the justices on which they could find as a fact that the schoolmaster had authority to make the rule here in question which purports to prohibit smoking by pupils during the term whether on the school premises or anywhere in public. It is not enough for the schoolmaster to say after the event that there is a rule to that effect. It was therefore a question of law whether it could be inferred in law that the extent of the

(1) [1902] 1 K. B. 857.

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schoolmaster's authority was such as to enable him to impose the rule in question and to punish a pupil for breach of it. The question being one of law, however the justices had decided it, they might properly be asked to state a case upon it for this Court. That appears from *Reg.* v. *Watson* (1) where, the question being whether the authority of a schoolmaster enabled him to detain a child after school hours and administer a nominal punishment, and the justices having held that it did and refused to state a case, it was held that there was a point of law as to the legality of the detention and punishment and that the justices were bound to state a case. The justices ought here to be ordered to state a case on the further ground that their decision of that question of law was wrong. The cases of *Cleary* v. *Booth* (2); *Mansell* v. *Griffin* (3); and *In re Basingstoke School* (4) only go to show that the authority of a schoolmaster to be inferred from the fact of a child being sent to his school is limited to the making and enforcing of rules applicable to the child while he is within the school precincts or actually on his way to or from school. In no case has it been held that the implied authority extends beyond these limits of space and time. The authority which the justices here supposed was given by the parent to the schoolmaster goes far beyond that which is sanctioned by the cases. The justices found that the father of the boy by sending him to the school authorized the schoolmaster to make reasonable school rules, and that the rule in question prohibiting smoking by pupils during the term whether on the school precincts or in public was a reasonable rule. These are findings of law, and they go too far, because they do not fix the limits of application of the rule. They regard the schoolmaster as having power to bind the pupil after he has left school for the day and returned home. According to the view of the justices the authority of the schoolmaster would almost equal that of the boy's father from which it is derived, and the boy during the day would seldom be free from it. A

(1) (1884) 48 J. P. 149.
(2) [1893] 1 Q. B. 465.
(3) [1908] 1 K. B. 160 (Div. Ct.), 947 (C. A.).
(4) 41 J. P. 118.

question of law here arises—namely, whether the father of the boy gave the schoolmaster authority to make a rule controlling the boy after he had left school and returned home, and the justices having decided that question are bound to state a case upon it for this Court.

LORD HEWART C.J. This is a rule nisi for an order in the nature of a mandamus to justices for the county of Salop and others to state and sign a case for the opinion of this Court. The applicant for the rule alleges that on the hearing of the information which he preferred against a certain schoolmaster for an alleged assault upon his son the justices were wrong in law in holding that the defendant had authority or jurisdiction to inflict corporal punishment upon the boy, that the boy at the time when he committed the act in respect of which the punishment was inflicted was under the control and authority of his father, and that that act was committed by the boy with the permission of his father, and therefore that the defendant had no authority to inflict the punishment.

It was urged in answer to the rule that this Court has no power to direct that a case be stated in the present instance inasmuch as the information was dismissed. It was said that where an information for a criminal offence is dismissed the unsuccessful prosecutor is not a person "aggrieved" within the meaning of the Summary Jurisdiction Act, 1879, s. 33, and may not require the statement of a case. In my opinion that argument fails, because it pays too little attention to the Summary Jurisdiction Act, 1857. It may well be that the unsuccessful prosecutor is not a person aggrieved within the meaning of the Act of 1879, but it does not follow that he does not come within the Act of 1857. Sect. 2 of the last mentioned Act provides that after the hearing and determination by a justice or justices of any information or complaint "either party to the proceeding . . . . may, if dissatisfied with the said determination as being erroneous in point of law, apply in writing . . . . to the said justice or justices, to state and sign a case." In

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order that a party may be entitled to apply for a case as a party dissatisfied with the determination of the justices within the meaning of that section, I think that it matters not that the case is a criminal case or that the party is the prosecutor who has failed. There is express authority on the point in the case of *Davis* v. *Douglas* (1) which was decided in the Court of Exchequer in 1859, two of the learned judges who decided it being Pollock C.B. and Martin B. It was there held that an appeal lies under the Act of 1857 where the justices dismiss the information. Pollock C.B. said: "The magistrates have expressed an opinion that the defendant was entitled to an acquittal; but at the same time they have reserved the question for the opinion of this court whether, in point of law, such their opinion was well founded. The 2nd section of the statute empowers the justices to state a case upon the application of 'either party.' We all think there is nothing in this objection." It was suggested that inasmuch as the provisions of the Act of 1857 in regard to the stating of cases are now to be read together with the corresponding provisions of the Act of 1879 (2), and as the later Act uses the expression "person aggrieved," the party dissatisfied under the earlier Act must also be aggrieved under the later Act. In my opinion that argument is fallacious, and there is no real authority to support it. Our attention has been directed to the cases of *Foss* v. *Best* (3) and *Stokes* v. *Mitcheson* (4), and to the case of *Reg.* v. *Keepers of the Peace and Justices of the County of London* (5), which was not under the Summary Jurisdiction Acts, but I find nowhere a clear expression of the view that an unsuccessful prosecutor may not still under the Act of 1857 apply for a case because he is dissatisfied with the determination of the justices as being erroneous in law.

Another reason was also suggested why a case could not be stated. Because the complaint has to do with an alleged assault under the Offences against the Person Act, 1861, it

(1) 23 J. P. 135.
(2) See *Stokes* v. *Mitcheson* [1902] 1 K. B. 857.
(3) [1906] 2 K. B. 105.
(4) [1902] 1 K. B. 857.
(5) 25 Q. B. D. 357.

was said that under ss. 44 and 45 of that Act the justices, if they had been asked to do so, could have granted to the defendant a certificate of dismissal which would have released him from all further proceedings for the same cause. On that point it is enough to say that in the present case the justices were not asked to give and did not give any such certificate.

I am satisfied, therefore, that, if the case did involve a question of law, this Court has power to direct the justices to state and sign a case.

But is the question involved in this case a question of law? The complaint of the present applicant was that the headmaster and the two assistant masters did unlawfully assault and beat the applicant's son on December 7 last. The justices have made a joint affidavit in which they state that they found the facts to be as follows: That there was at the school a school rule prohibiting smoking by pupils during the school term on the school premises and in public; that that rule was a reasonable rule; and that the boy was aware of the rule and deliberately broke it. The justices add that they found that the punishment administered was a reasonable punishment for the breach of the rule; and that the father of the boy by sending him to the school authorized the schoolmaster to administer reasonable punishment to the boy for breach of a reasonable school rule. These being the findings of fact, what is the point of law which is said to emerge? Apparently it is a question as to the authority of the schoolmaster to make and to enforce the rule in question, which contemplates acts done, not indeed beyond the school term, but beyond the precincts of the school and in public. It is obvious that the justices in directing their minds to the facts have taken a view of the law. Is there any ground for saying that the view which they have taken is a wrong view? Mr. Walker referred us to *Mansell* v. *Griffin* (1), in which an assistant teacher was charged with assault for inflicting corporal punishment upon a pupil for a breach of the school regulations. In the course of his judgment in that case Walton J. said: "There is no evidence in this

(1) [1908] 1 K. B. 160, 947.

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case that the parents of the plaintiff had any knowledge of the regulations of the school, and therefore it must be taken that the parents gave to the authorities of the school that ordinary authority which is presumed from the fact of a parent sending a child to a school." (1) He also said: "It seems to me that the authority to administer moderate and reasonable corporal punishment, which any parent who sends a child to school is presumed to give to the authorities of the school, extends to the mistress occupying the position which the defendant occupied in this school." (1) That is a clear statement of the legal proposition that any parent who sends a child to school is presumed to give to the teacher authority to make reasonable regulations and to administer to the child reasonable corporal punishment for breach of those regulations. So far from holding a view contrary to that statement of the law, the justices have almost in terms expressed the same view of the law as is there set forth. To refer to another case, in *Cleary* v. *Booth* (2), Collins J., as he then was, said: "It is clear that the relation of master and pupil carries with it the right of reasonable corporal chastisement. As a matter of common sense, how far is this power delegated by the parent to the schoolmaster? Is it limited to the time during which the boy is within the four walls of the school, or does it extend in any sense beyond that limit? In my opinion the purpose with which the paternal authority is delegated to the schoolmaster, who is entrusted with the bringing up and discipline of the child, must to some extent include an authority over the child while he is outside the four walls. It may be a question of fact in each case whether the conduct of the master in inflicting corporal punishment is right." (3) He further said: "It cannot be that such a duty or power ceases the moment that the pupil leaves school for home; there is not much opportunity for a boy to exhibit his moral conduct while in school under the eye of the master: the opportunity is while he is at play or outside the school; and if the schoolmaster has no control over the boys in their

(1) [1908] 1 K. B. 169. (2) [1893] 1 Q. B. 465.
(3) [1893] 1 Q. B. 468.

relation to each other except when they are within the school walls, this object of the Code would be defeated." (1) These observations seem to me to express very clearly the principles applicable to the present case. The justices appear to have rightly appreciated the law as there laid down, and the question was therefore only one of fact—namely, whether in the circumstances the conduct of the master in inflicting the punishment was reasonable. It has been suggested as a reductio ad absurdum that the schoolmaster might make one foolish rule and the father of the scholar a contrary foolish rule, and afterwards the boy whether he did the act to which the rules applied or not would equally suffer punishment under either the one rule or the other. The case so put seems to exemplify the saying of Horace: "Quidquid delirant reges, plectuntur Achivi." (2) It does not however arise here, because it does not appear that the applicant had laid down any rule, and he has stated in evidence that if he had known that the rule in question was the rule of the school he would not have allowed the boy to break it.

There having been no misapprehension of the law or misdirection in point of law by the justices, the question was and remains a question of fact on which the decision of the justices is final. I see no ground for the statement of a case on a point of law, and in my opinion this rule should be discharged.

AVORY J. I am of the same opinion. As to the preliminary objection taken on behalf of the justices it seems to me that it cannot be sustained. I agree that in a case where a complaint in respect of a criminal offence has been dismissed by justices there is statutory power to state a case under the Summary Jurisdiction Act, 1857. The jurisdiction of the justices to state a case under that Act, or of this Court to compel them to do so, only arises where a party is dissatisfied with their determination as being erroneous in point of law. The mere fact that some question of law has arisen before the justices is not, however, of itself a sufficient

(1) [1893] 1 Q. B. 469. (2) Horace, Epistles II. 14.

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reason for calling upon them to state a case under the Act where they have refused to do so on the ground that the application is merely frivolous. It has more than once been stated in this Court that an application for a case may be frivolous even where some question of law arose before the justices, if that question has already been the subject of decision so that no further argument regarding it is possible, and the justices have properly applied the law as previously laid down. In these circumstances the application may be just as frivolous as if the question which arose was not a question of law but only one of fact.

The other point in support of the preliminary objection is taken under s. 45 of the Offences against the Person Act, 1861, which provides that if a person against whom a complaint for an assault shall have been preferred shall have obtained from the justices a certificate of dismissal he shall be released from all further or other proceedings, civil or criminal, for the same cause. As it is not suggested that any such certificate has been applied for or obtained in the present case, that point cannot properly be raised here, and it is not necessary to express an opinion upon it.

As to the merits, I agree that the decision of the justices was right and that no question of law arises on which a case should be stated. As I was a member of the Court which granted the rule, I should like however to add that it was granted upon an affidavit which declared that the boy was over sixteen when in fact he was under that age and therefore contravening the law by smoking in the street. (1) The affidavit ought to have disclosed that fact. It was also alleged in the affidavit that the boy Wright had no knowledge of the rule of the school against smoking. But the justices have found that the boy had knowledge of the rule and deliberately broke it. In these two respects the affidavit was misleading. Apart, however, from what is shown on the affidavit there is, in my opinion, no ground on which the Court should direct the justices to state and sign a case.

(1) See Children Act, 1908 (8 Edw. 7, c. 67), s. 40.

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SWIFT J. I also am of opinion that this Court has power to order the justices to state a case, and that in this instance they ought not to do so.

Order Nisi discharged.

Solicitors: *Church, Adams, Tatham & Co., for Liddle & Heane, Newport, Shropshire; Robbins, Olivey & Lake, for Sharpe & Millichip, West Bromwich.*

J. R.

THE KING *v.* J. G. HAY HALKETT, ESQUIRE.

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April 24.

Justices—Procedure—Summons—Service of Copy—Unsigned Copy—Validity—Metropolitan Police Courts Act, 1839 (2 & 3 *Vict. c.* 71), *ss.* 19, 20, 49 *—Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *ss.* 1, 32.

Where a summons, issued by a magistrate at a metropolitan police court, commanding a defendant to answer an information for breach of a nuisance order previously made against the defendant in the Court, is in all respects in the proper form and duly signed by the magistrate, the omission through inadvertence from the copy of the summons which is served upon the defendant of the signature of the magistrate or any signature is a mere defect in form which does not invalidate that copy of the summons or the service thereof.

ORDER NISI for a certiorari.

Miss W. V. Rush (hereinafter called "the applicant") was the owner of a house, No. 16 Walterton Road, in the borough of Paddington. On May 3, 1928, at the Marylebone Police Court, on the hearing of an information laid against the applicant in that behalf by a sanitary inspector of the corporation of the metropolitan borough of Paddington, a nuisance order under the Public Health (London) Act, 1891, was made against her by J. G. Hay Halkett, Esq., the magistrate at that court requiring her within a specified time to prevent a drain at the said house from being a nuisance or dangerous to health and to amend the drain.

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On July 3, 1928, an information was laid before the court alleging that the applicant had failed to comply with the nuisance order, and on the same date a summons was issued commanding the applicant to appear at the court on a specified date to answer the information, that summons being in all respects in the proper form and duly signed by H. C. A. Bingley, Esq., a magistrate of the Metropolitan Police Courts, who was then sitting during the temporary absence of the said J. G. Hay Halkett, Esq. (1)

On July 4, 1928, a document was served upon the applicant which was in all respects a true copy of that summons except that it did not bear the signature of the magistrate by whom the original summons was signed or any signature.

On August 20, 1928, after two previous adjournments, the summons came on for hearing in the court before Mr. J. G. Hay Halkett. The applicant attended at the court and produced the copy of the summons with which she had been served, but she took the objection that as that copy contained no signature it had not been properly issued or served upon her, and alleged that the court had no jurisdiction to hear the case, and that she attended under protest.

(1) The original summons was in the following terms :—

"To Miss Winifred Victoria Rush of 17 Stonebridge Park, Harlesden, owner of the premises situate and being 16 Walterton Road in the borough of Paddington.

"Whereas information hath this day been laid before the undersigned, one of the magistrates of the police courts of the Metropolis sitting at the police court at Marylebone in the county of London and within the Metropolitan Police District by Ernest Bertie Wilde, sanitary inspector, on behalf of the Mayor, Aldermen and Councillors of the metropolitan borough of Paddington that you have failed to comply with the terms of a nuisance order made on the 3rd day of May, 1928, such nuisance order being made by John Gilbert Hay Halkett, Esq., one of the magistrates of the police courts of the Metropolis.

"These are therefore to command you to be and appear on Thursday, the 12th day of July, 1928, at 2 o'clock in the afternoon at the police court aforesaid before me or such other magistrate of the said police court as may then be there to answer to the said information.

"Given under my hand and seal this 3rd day of July in the year of our Lord, 1928, at the police court aforesaid.

(Signed)
HENRY CAMPBELL
ALCHORNE BINGLEY,
Magistrate of the Police
Courts of the Metropolis." L.S.

She took no part in the proceedings, and said that she attended not as a defendant but as a spectator.

The magistrate overruled the applicant's objection on the grounds that she had actually attended the court and that the objection was not well founded; and he thereupon heard the case, and, having considered the evidence, convicted the applicant and ordered her to pay a fine and costs.

The above mentioned facts were not in dispute.

On January 18, 1929, in the High Court, the applicant applied for and obtained an order nisi directed to the magistrate to show cause why a writ of certiorari should not issue to remove the conviction into the High Court to be quashed on the ground that the summons calling upon the applicant to appear at the police court did not purport to be signed by the magistrate or at all.

The application was supported by an affidavit of the applicant. An affidavit in answer thereto by J. G. Hay Halkett, Esq., was also before the Court. An affidavit by H. C. A. Bingley, Esq., was also read.

Sir Boyd Merriman S.-G. and *Giveen* showed cause. The document which was served upon the applicant contained everything that was contained in the original summons except the signature of the magistrate who issued the original, and the mere fact that it did not contain that signature or any signature did not prevent it from being a good summons or copy of a summons. The applicant having failed to comply with a nuisance order which had been made against her under the Public Health (London) Act, 1891, she became liable under s. 5, sub-s. 9, of that Act to a fine, which by s. 117, sub-s. 1, thereof might be prosecuted and recovered in manner directed by the Summary Jurisdiction Acts. A complaint for non-compliance with the nuisance order was accordingly made before the police court to be prosecuted in manner directed by the last mentioned Acts. The Summary Jurisdiction Act, 1848, provides (s. 1) that in all cases where an information shall be laid before one or more justices that any person has committed any offence within the jurisdiction

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for which he is liable upon summary conviction to be imprisoned or fined, and in all cases where a complaint shall be made to any such justice or justices, it shall be lawful for such justice or justices "to issue his or their summons directed to such person, stating shortly the matter of such information or complaint, and requiring him to appear" at a certain time and place before the same justice or justices, or before such other justice or justices as shall then be there, to answer to the information or complaint; and every such summons shall be served upon the person to whom it is so directed: "Provided . . . . that no objection shall be taken or allowed to any information, complaint, or summons, for any alleged defect therein in substance or in form"; (s. 32) that the forms in the Schedule to the Act, or forms to the like effect, shall be deemed good, valid, and sufficient in law; and (s. 33) that any one of the magistrates appointed to act at any of the police courts of the Metropolis, and sitting at a police court within the Metropolitan Police District, shall have full power to do alone whatsoever is authorized by this Act to be done by any one or more justice or justices of the peace; and that the several forms thereinafter mentioned may be varied so far as it may be necessary to render them applicable to the police courts aforesaid. The Metropolitan Police Courts Act, 1839, provides (s. 19) that a magistrate may proceed by summons; (s. 20) that "every such summons may be served by delivering a copy of the summons"; and (s. 49) that "no information, conviction, or other proceeding before or by any of the said magistrates shall be quashed or set aside, or adjudged void or insufficient, for want of form, or be removed by certiorari." In view of these provisions it cannot be maintained that the document which was served upon the applicant was not a good copy of the summons. When a magistrate in fact issues a summons, the summons is valid whether he signs it or not. The omission of his signature is a "defect . . . . in substance or in form" within s. 1 of the Act of 1848 for which no objection can be taken to the summons, or is a "want of form" within s. 49 of the Act of 1839 for which the summons cannot be adjudged void

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or insufficient. A fortiori, in a case such as the present, where the magistrate issues a summons which is duly signed by him and a copy is served which is in all respects a true copy except that it does not bear the signature of the magistrate the omission of the signature from the copy is a mere defect in form or want of form within the meaning of these provisions which does not render the copy void or insufficient. Whether the applicant says that the document served upon her was a summons which was not signed by the magistrate, or that it was a copy which was not a true copy of the original, in either case the defect was one of form only, which did not invalidate the service. In *Rex* v. *Garrett-Pegge. Ex parte Brown* (1) it was held that, if the absence of a seal from a summons issued by a justice of the peace was a defect, it was a defect in form within the meaning of s. 1 of the Act of 1848 and that the summons was valid. That case is an authority in favour of the view that the copy summons now in question is sufficient, and it is an even stronger authority than is required for that purpose, because the seal is a higher form of attestation than the signature of the magistrate.

[AVORY J. The seal would not show that the unsigned summons had been issued by the magistrate.]

The absence of the signature from the copy served upon the applicant could not have misled her. The copy stated that information had been laid "before the undersigned," and as it was not signed the applicant was immediately apprised of the defect and might have had it remedied. The Summary Jurisdiction Rules, 1915, provide by r. 60 that the forms in the schedule to the Rules, or "forms to the like effect," may be used. It is not contended that the words "defect . . . . in form" in s. 1 of the Act of 1848, and "want of form" in s. 49 of the Act of 1839, are subject to no limitation, and that there may not be a defect in a document forming part of the proceedings which would render it invalid, but this is not a defect of that kind. It appears from *Eggington* v. *Pearl* (2) that where the summons specified a different charge from that on which the defendant was tried,

(1) [1911] 1 K. B. 880. (2) (1875) 33 L. T. 428.

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the defendant would have been entitled to take the objection that there was no summons and that the magistrate had no jurisdiction; but in the present case the copy summons correctly stated the charge. In *Dixon* v. *Wells* (1) it was held that, where a summons was signed by a justice who had not heard the application made for the summons on the laying of the information, the summons was illegally issued and was in fact no summons; but here the original summons was signed by the magistrate who heard the application for it, and the defect was one of mere form.

Montgomery K.C. and *Laskey* for the applicant in support of the order nisi. The applicant was not served with a good summons or copy of a summons, and the magistrate had no jurisdiction to entertain the complaint which was made against her. It is not disputed that a person charged before a metropolitan police magistrate may be served under the Summary Jurisdiction Act, 1848, by delivering to him a summons to which no objection shall be taken for any alleged defect therein in substance or in form; or under the Metropolitan Police Courts Act, 1839, ss. 19 and 20, by a summons or copy of a summons, which by s. 49 shall not be adjudged void or insufficient for want of form. It is not even disputed that service of a summons or copy thereof upon the person charged is not in every case essential in order to give the magistrate jurisdiction. Where a person charged, who has not been served with a document either being or purporting to be a summons or copy of a summons, puts in an appearance in law by attending the court and consenting to a trial, the magistrate may have jurisdiction to try the case: *Eggington* v. *Pearl.* (2) But where the person charged has been served with a document, then, whether he puts in an appearance or not, unless the document is a valid summons or copy of a summons, the magistrate has no jurisdiction: see *Dixon* v. *Wells.* (1) In the present case the applicant did not put in any legal appearance, inasmuch as she attended the court not as a defendant but only as a spectator. But, further, even if she had attended as a defendant, inasmuch as she

(1) (1890) 25 Q. B. D. 249. (2) (1875) 33 L. T. 428.

had been served with a document purporting to be a summons or a copy of a summons, her attendance did not give the magistrate jurisdiction unless that document was a valid summons or copy of a summons. In either event, therefore, whether the defendant put in a legal appearance or not, it was essential to the jurisdiction that the document with which she was served should be a valid summons or copy summons. The document was neither a valid summons nor copy thereof. It was, admittedly, not the original summons. It was not a summons, because it was not signed by the magistrate in accordance with the enactments. The Act of 1848 by s. 1 only empowers a justice or justices to issue "his or their summons," and by s. 33 it puts a magistrate in the position of the justice or justices. The forms of summons under the Summary Jurisdiction Rules, 1915, show clearly that the summons must be signed. The absence of the signature is not a mere "want of form" within the meaning of s. 49 of the Act of 1839, or a "defect . . . . in substance or in form" within s. 1 of the Act of 1848. The case of *Rex* v. *Garrett-Pegge. Ex parte Brown* (1), in which it was held that the absence of the seal from a summons was a defect in form within the latter section, does not conclude the present case. The signature is more important than the seal. It is of the essence of the summons as the seal is not. Without it the person served cannot know before whom he is summoned to appear. A writ of summons without the signature of the Lord Chancellor would be of no legal effect. Further, the document in question was not a valid copy of a summons. The summons of which it purported to be a copy—namely, the original summons, was duly signed by the magistrate, but the document in question omitted the signature.

LORD HEWART C.J. This is an order nisi calling upon J. G. Hay Halkett, Esq., one of the magistrates of the Metropolis, to show cause why a writ of certiorari should not issue to remove into this Court a conviction dated

(1) [1911] 1 K. B. 880.

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August 20, 1928, whereby the applicant, Winifred Victoria Rush, was convicted for that she had failed to comply with a nuisance order made on May 3, 1928. The main facts are not in dispute, and it is unnecessary to reiterate them. The case turns on a comparatively small point. It is not denied, on the contrary it is expressly admitted, that a document served upon the applicant and purporting to be a copy of a summons, although in all other respects complete and regular, did not bear the signature of the metropolitan magistrate who issued the summons. It is also common ground that that learned magistrate had issued a summons which was in all respects complete and which did bear his signature. The question, therefore, is whether by reason of the state of the document served upon the applicant, that is to say by reason of the fact that the magistrate's signature was not upon it, there was no service upon her of any summons and consequently no jurisdiction in the magistrate to hear any charge against her.

In my opinion a good deal of ground has been covered during the argument which is not really in controversy. I do not enter upon the discussion of the question whether if the original summons had lacked a signature it would have been protected by the words of s. 1 of the Summary Jurisdiction Act, 1848, "no objection shall be taken or allowed to any information, complaint, or summons, for any alleged defect therein in substance or in form." Some day, no doubt, that question will have to be decided, but meanwhile I refrain from expressing any opinion upon it. The question which here arises relates not to the omission of the signature from the original summons, but only to its omission from a document purporting to be a copy of the original. The Metropolitan Police Courts Act, 1839, which is earlier than the Summary Jurisdiction Act, 1848, provides by s. 19 that a magistrate may proceed by summons, and by s. 20 that every such summons may be served by delivering a copy of the summons. Under that statute, therefore, service of a copy of the summons is sufficient. The document here in question failed to be an

accurate copy of the summons in one respect and in one respect only. It did not reproduce the signature of the magistrate which was admittedly upon the original summons. In my opinion the failure of the document in this respect was mere want of form within the meaning of s. 49 of the Act of 1839, which provides that "no information, conviction, or other proceeding before or by any of the said magistrates shall be quashed or set aside, or adjudged void or insufficient, for want of form or be removed by certiorari into" the Court of King's Bench. It is the more easy in this case to arrive at the conclusion that the defect in question is mere want of form because of the history of the case. The document informs the defendant, the present applicant, that information has been laid before one of the magistrates of the Metropolis sitting at Marylebone on behalf of the corporation of Paddington, "that you have failed to comply with the terms of a nuisance order made on the 3rd day of May, 1928," and the document then commands her to appear at a specified time at the said police court. In other words, the document informs the defendant of the continuation of proceedings of the existence of which she was already perfectly well aware.

I do not, however, found my decision on the particular facts of the case, but on the general ground that the omission of the signature of the magistrate from a copy of a summons where the original summons is signed and otherwise perfectly regular amounts to no more than a simple want of form.

For the reasons which I have given I think that this rule should be discharged.

AVORY J. I agree and I have nothing to add.

SWIFT J. I agree.

Order Nisi discharged.

Solicitors: *The Treasury Solicitor; R. D. C. Graham.*

J. R.

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April 25.

SEVENOAKS URBAN DISTRICT COUNCIL *v.* TWYNAM.

Practice—Highway—Proposal to provide parking Place—Objection—Decision adverse to Objector—Appeal—Grounds of Appeal common to all Ratepayers—"Person . . . . aggrieved"—Public Health Act, 1925 (15 & 16 *Geo.* 5, *c.* 71), *s.* 68, *sub-s.* 3.

Where a local authority has given notice under s. 68, sub-s. 2, of the Public Health Act, 1925, of a proposal to acquire land in order to provide parking places for vehicles, and has given a decision against an objection duly made thereto under sub-s. 3, the objector (being entitled to make the objection) is a "person . . . . aggrieved" by the decision, and may accordingly appeal therefrom under the provisions of sub-s. 3, although he alleges no grounds of objection personal to himself, but such only as are common to himself and other ratepayers and inhabitants.

CASE stated by Kent Quarter Sessions.

The appellants, the Sevenoaks Urban District Council, proposed in the exercise of powers conferred on them by s. 68 of the Public Health Act, 1925 (15 & 16 Geo. 5, c. 71), to acquire land in their district for the provision of parking places. The respondent, Dr. G. E. Twynam, a ratepayer, duly gave notice in writing under sub-s. 3 of the above section that he objected to the above proposal on the grounds that: (1.) the ratepayers should have been consulted; (2.) the site was too valuable and important to be sterilized by a non-productive undertaking; (3.) the purchase price and consequential expenses were out of all reason for the purpose; (4.) there was no reasonable prospect of any money return; (5.) the ratepayers should not be forced to subsidize commercial undertakings such as omnibus companies; (6.) the large omnibus companies foreshadowed the relinquishing of Sevenoaks as a terminus; (7.) the Market Place would then be sufficient for all (if any) omnibuses which required a terminus; (8.) there now existed a far more convenient park, which could be put into service forthwith, which would avoid all capital charges arising from a loan and for which all charges would fall on revenue; (9.) if it proved that a permanent park was necessary, time for entering into some less extravagant arrangement would be available; (10.) endeavour should be made to distribute, not to

concentrate parks; (11.) the present proposal introduced grave traffic dangers.

It was admitted that in making the above objection the respondent did not allege the infringement of any personal right, but that he objected in his capacity only as a ratepayer and a member of the public on grounds common to them and him.

The appellants considered the objection, and informed the respondent in writing of their decision to proceed with the scheme. By s. 68, sub-s. 3, of the Act of 1925: "If any person is aggrieved by any such decision he may . . . . appeal therefrom to a petty sessional court."

The present respondent alleging that he was a "person . . . . aggrieved by . . . . such decision" appealed to petty sessions, which allowed his objection. The appellants appealed to quarter sessions, and it being a rehearing, took the preliminary objection that the respondent was not a "person . . . . aggrieved" because his objection alleged no infringement of any legal right personal to him, but only of such rights as were common to all ratepayers, and that therefore he had no right of appeal. Quarter sessions overruled the contention, but stated this case.

Whiteley K.C. and *Russell Davies* for the appellants. Quarter sessions were wrong in holding that the respondent was a person aggrieved within the meaning of s. 68, sub-s. 3, of the Act of 1925. In *Ex parte Sidebotham* (1) James L.J. said: "A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something." No doubt any person under the provisions of s. 68, sub-s. 3, of the Act may send an objection to the proposal of the council, but, by the same sub-section, only a "person . . . . aggrieved" may appeal. It is said that if the decision is against the objector he is "aggrieved," but his grievance is not a personal one. This is not like a

(1) (1880) 14 Ch. D. 458, 465.

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consultative case under the Arbitration Act, because the case states that if the decision of the Court is against the appellants the appeal is to be dismissed. Decisions under the Highway, Bankruptcy and Licensing Acts show that "aggrieved" means personally aggrieved, and the word having been given a judicial interpretation in those Acts ought to be given the same meaning in this Act. In *Boyce* v. *Higgins* (1) Jervis C.J. said during the argument (2): "So far as the pier is concerned he has no more interest than any other member of the public, and a public grief will not do for his purpose," which purpose was to show that he was a "party grieved" within s. 133 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), entitling him to sue for penalties. *Ex parte Sidebotham* (3) was cited with approval in *Ex parte Official Receiver. In re Reed, Bowen & Co.* (4)

The respondent was not represented.

LORD HEWART C.J. This is a case stated by quarter sessions for the opinion of this Court. The question which is involved arises in the following way. There came before the court of quarter sessions an appeal by way of rehearing of a complaint which had been made by the present respondent, Dr. George Edward Twynam, to the petty sessional court of Sevenoaks, whereby he alleged that he was aggrieved by the decision of the urban district council of Sevenoaks to proceed with the purchase of certain land under the Public Health Act, 1925, s. 68, in spite of certain objections of which he had given notice in writing to the appellants in accordance with the Act. That appeal came before the court of quarter sessions on January 3, 1929, and thereupon the learned counsel who appeared for the present appellants submitted, by way of preliminary objection, that the respondent in this appeal was not a "person . . . . aggrieved" within the meaning of s. 68, sub-s. 3, of the statute, inasmuch as the grounds of his objection alleged no infringement of any legal right of the respondent, and were only such grounds

(1) (1853) 23 L. J. (C. P.) 5.
(2) Ibid. 8.
(3) 14 Ch. D. 458.
(4) (1887) 19 Q. B. D. 174.

as might be common to all ratepayers or members of the public. The case states as a fact that it was admitted on behalf of the respondent that he did not allege the infringement of any personal legal right, and that he objected in his capacity as a ratepayer and as a member of the public. Nevertheless the respondent contended that any person whose objection had been disregarded was a person aggrieved by that adverse decision. The court of quarter sessions having considered the matter came to the conclusion that the appellants were wrong in their preliminary objection, and upheld the contention of the respondent. Accordingly the court called upon the respondent to adduce evidence in support of his objections. Afterwards it was decided to state a special case for the opinion of this Court upon the preliminary objection.

The question which is raised by the case is whether the court of quarter sessions was right in holding that the respondent was a "person . . . . aggrieved" within the meaning of the Public Health Act, 1925, s. 68, sub-s. 3, and the justices in quarter sessions say that, in the event of our deciding that they were right in their view on that matter, then the case ought to be remitted to them in order that they may hear and determine according to the evidence. The question therefore is: Is it true to say that in these circumstances and within the meaning of this part of this statute this respondent was a "person . . . . aggrieved"? Now undoubtedly those words, "a person aggrieved," have very often been considered, and, if one looked at the mere terms apart from their context and apart from the particular circumstances, it would have been quite easy to marshal decisions of contradictory import. But as has been said again and again there is often little utility in seeking to interpret particular expressions in one statute by reference to decisions given upon similar expressions in different statutes which have been enacted alio intuitu. The problem with which we are concerned is not, what is the meaning of the expression "aggrieved" in any one of a dozen other statutes, but what is its meaning in this part of this statute? It is a little

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important to see what this part of this statute is dealing with. The words are in Part VIII. of the Act, which bears the heading "Miscellaneous," and the particular purpose of s. 68 is to provide a power to obtain parking places for vehicles. Sect. 68, sub-s. 1, provides shortly that: "Where for the purpose of relieving or preventing congestion of traffic it appears to the local authority to be necessary to provide within their district suitable parking places for vehicles," then that authority may, subject to certain conditions, provide those parking places, and in particular the local authority may acquire land suitable for use as a parking place, or do other acts which are named. But there follows a proviso: "Provided that no such order"—that is, an order authorizing the use as a parking place of any part of a street within their district—"shall (i.) authorise the use of any part of a street so as unreasonably to prevent access to any premises adjoining the street, or the use of the street by any person entitled to the use thereof, or so as to be a nuisance; or (ii.) be made in respect of any part of a street without the consent of the authority or person responsible for the maintenance of the street." That proviso seems to be limited to the order which is mentioned in para. (*c*), where the step taken is to authorize the use as a parking place of any part of a street. Then one comes to sub-s. 3, which is in these terms: "Before carrying into effect any proposal of which notice is required by this section to be given"—I may mention in passing that what was done here was something of which, by sub-s. 2, notice was required to be given—"the local authority shall consider any objection to the proposal which is sent to them in writing within the time fixed in that behalf, and shall, after so considering it, give notice of their decision to the person by whom the objection was made, and if any person is aggrieved by any such decision he may, within twenty-one days after receiving notice thereof, appeal therefrom to a petty sessional court." A series of steps is contemplated: notice of the proposal is to be given; secondly, any objection to the proposal, if made in writing and within the proper time, is to be considered;

thirdly, after the objection has been considered notice of the decision is to be given to the person by whom the objection is made; and, fourthly, if any person is aggrieved by any such decision he may appeal. It is in that context and for those purposes that we have to consider the meaning of the expression "if any person is aggrieved." The argument is that the respondent was not and could not be a person aggrieved, because he did not allege an infringement of any legal right of his own, but merely alleged such grounds as might be common to all ratepayers. The particular proposal which was in question here was one to acquire by purchase certain lands. That is to say, the urban district council of Sevenoaks was acting under s. 68, sub-s. 1 (*a*), whereby it was entitled to acquire land suitable for use as a parking place. The respondent objected, and he chose to set up the grounds of his objection. He objects, for example, on the ground that the site is too valuable and important to be sterilized by a non-productive undertaking, on the ground that the ratepayers should not be forced to subsidize commercial undertakings such as omnibus companies, and again, for example, on the ground that the proposal involved grave traffic dangers—nothing, it will be seen, special and individual to himself.

Our attention has been directed to the case of *Ex parte Sidebotham* (1), where, dealing with a bankruptcy matter, James L.J. said this (2): "A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something. In *Ex parte Ellis* (3) we held that where an adjudication of bankruptcy had been made, founded upon the execution of a bill of sale as an act of bankruptcy, the holder of the bill of sale was a 'person aggrieved' by the adjudication, and was entitled to appeal from it because it affected his property. And in *Ex parte Walter* (4) we held that a creditor who had not been

(1) 14 Ch. D. 458.
(2) Ibid. 465.
(3) (1876) 2 Ch. D. 797.
(4) (1876) 2 Ch. D. 326.

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heard before the Registrar on the question of the registration of liquidation resolutions was entitled to appeal from the Registrar's order, because the question of the registration or non-registration of such resolution is one which affects the interests of all the creditors." In that case it was held that the comptroller alone was entitled to appeal. Bramwell L.J. said (1): "I cannot see that any other person would have a right to attend the proceedings." It is argued that it is an interpretation of that character which is to be applied to the words here. Those words were considered in the case of *Ex parte Official Receiver. In re Reed, Bowen & Co.* (2) There it was held: "When an application made by the official receiver under s. 20 of the Bankruptcy Act, 1883, and r. 191 of the Bankruptcy Rules, 1886, for an immediate adjudication of bankruptcy against a debtor, on the non-approval of a scheme of arrangement, has been refused or adjourned, the official receiver is a 'person aggrieved' by the order, and as such is entitled to appeal against it." Fry L.J. dissented from that conclusion, but it was so held by Lord Esher M.R. and by Lopes L.J. Lord Esher in his judgment said (3): "The only person who is entitled to appeal is a 'person aggrieved' by the decision, and the question is whether, under the circumstances which I have stated, the official receiver can be said to be, within the meaning of s. 104, a 'person aggrieved.' In *Ex parte Sidebotham* (4), James L.J. said: 'A "person aggrieved" must be a man who has suffered a legal grievance' (he does not say a pecuniary grievance, a grievance to his property or to his person; he says 'a legal grievance'), 'a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something.' It cannot mean wrongfully refusing him something, unless it be a refusal of something for which he had a right to ask, so that that definition of James L.J., would mean a 'person aggrieved' must be a man against whom a decision has been pronounced which

(1) 14 Ch. D. 466.
(2) 19 Q. B. D. 174.
(3) 19 Q. B. D. 177.
(4) 14 Ch. D. 458, 465.

has wrongfully refused him something which he had a right to demand." Lord Esher went on to say: "This is not an exhaustive definition, but it is an affirmative definition of a person who may appeal, and at all events it includes a person who has asked for a decision for which he had a right to ask, and has been wrongfully refused. And Bramwell L.J. said" (1)—I am still quoting from the judgment of Lord Esher—"'But certainly the general rule is that an appeal must be by the party' (that means one of the parties to the dispute which is brought before the Court for its decision) 'who has endeavoured to maintain the contrary of that which has taken place.' That seems to me to be to the same effect as part of the definition of James L.J., and it means that where there are two parties to the application—the one applying, the other asking that the application may be refused—one of them has endeavoured to maintain the contrary of that which has taken place, and, according to this definition, he is a party against whom a decision has been given, and, according to both definitions, he has a right to appeal, on the ground that he is legally a 'person aggrieved' by the decision, being in the same position as a party to a litigation." In like manner Lopes L.J., referring to the judgment in *Ex parte Sidebotham* (2) said (3): "Then James L.J. went on to say, 'a man against whom a decision has been pronounced which has wrongfully deprived him of something.' I think the official receiver has been 'wrongfully deprived of something' here: he has been wrongfully deprived in not having an application granted which he was entitled to make." When one looks at expressions like "an application . . . . which he was entitled to make" or in the judgment of Lord Esher, "a person who has asked for a decision for which he had a right to ask, and has been wrongfully refused," (4) I cannot imagine that those words are to be read as meaning "an application which he was not merely entitled to make but was also entitled to succeed in," nor that by a decision which "has been wrongfully refused," any more is meant than that he

(1) 14 Ch. D. 466.
(2) Ibid. 458.
(3) 19 Q. B. D. 181.
(4) Ibid. 178.

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believes he has been wrongfully refused; otherwise the conclusion would be that he is not a "person aggrieved" so as to be able to appeal unless he must of necessity succeed in his appeal. Applying that kind of reasoning to the present case I think this respondent did ask for a decision for which he had a right to ask. He did give notice of an objection of which he was entitled to give notice, and when I look at the particular provisions of s. 68 I find great difficulty in believing that the intention is that any objection to the proposal is to be considered, and the decision about the proposal is to be communicated to the person making the objection, but the person making the objection is not to have an appeal unless he satisfies two conditions: (1.) that he is the author of the objection, and (2.) that he is aggrieved by the refusal in the sense that he has a special and individual right infringed. It seems to me that upon the fair construction of this sub-section, which is by no means a common kind of statutory provision, what is meant is that a person may make an objection and is entitled to a decision upon it, and if the decision is adverse to him, he may, if he thinks fit and subject to the usual consequences, appeal from it to a petty sessional court, and so appealing, may, in consequence of other statutory provisions, appeal, if need be, to the court of quarter sessions.

I have come to the conclusion, therefore, that under this particular section in this particular Act of Parliament this respondent was in the circumstances a person aggrieved. It is said that such a construction involves rather terrifying possibilities in the way of a number of appeals, a multiplicity of appeals. I cannot think that there is any substance in that objection. I am not going to suppose that if one rate-payer raises objections of the kind which are set out here and fails, and incurs costs, a great number of his fellow rate-payers are going to take the same course and incur similar costs. Moreover I think one must look at the words of the section without regard to hypothetical consequences of that kind.

It seems to me, therefore, that these justices upon the preliminary objection came to the right conclusion, and that this appeal fails and that the matter ought to go back to the court of quarter sessions to hear and determine according to the evidence.

AVORY J. I am of the same opinion. Quite apart from any of the authorities which have been cited, I think the effect of this statute is to give a right of appeal to a person who has made an objection under s. 68 and that objection has been decided adversely to him. Sect. 68, sub-s. 2, provides that where a local authority propose to acquire land for the purpose of using it as a parking place, they are to give notice of their proposal, specifying the land and notifying the date within which any objection is to be sent to them, and the notice is to contain a notification of the right of appeal conferred by the section. On the face of it such notice would indicate to any person who wishes to object that he will have a right of appeal if his objection is overruled. Sub-sect. 3 then proceeds: "Before carrying into effect any proposal of which notice is required by this section to be given, the local authority shall consider any objection to the proposal which is sent to them in writing." There is no limit there to the kind of person or the kind of objection which may be made. It proceeds that after so considering the objection, they are to give notice of their decision to the person by whom the objection was made, and any person who is aggrieved by such decision may appeal. I cannot help thinking that on the plain words of that statute it was intended to give a right of appeal to any person who has made an objection to the proposal and has received notice that that objection has been overruled. I need not refer again to the cases my Lord has mentioned, but it is significant to observe that in the case of *Ex parte Official Receiver. In re Reed, Bowen & Co.* (1), the argument there of Mr. Muir Mackenzie for the appellant (the official receiver, who was claiming the right to appeal) was in these words (2):

(1) 19 Q. B. D. 174. (2) 19 Q. B. D. 175.

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"Rule 191 [of the Bankruptcy Rules, 1886] authorizes the official receiver to make this application to the Court under s. 20," that is an application that a debtor shall be adjudged bankrupt, "and it follows that he is entitled to appeal against the order made by the judge," which was an order refusing the application. That argument was in effect adopted by the majority of the Court—Lord Esher M.R. and Lopes L.J.—namely, that because the official receiver was a person entitled to make the claim, therefore he was entitled to appeal, s. 104, sub-s. 2, of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), saying: "Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal." The Court said he was a "person aggrieved" because he was a person entitled to make the application, which application had been refused or decided against him. In my opinion therefore this respondent, although not alleging any pecuniary or actual personal grievance against this proposal, was a person entitled to appeal under s. 68, sub-s. 3. I agree with my Lord in the order which it is proposed to make.

SWIFT J. I am of the same opinion.

Appeal dismissed: Case remitted for hearing.

Solicitors for appellants: *Routh, Stacey & Castle, for Knocker, Knocker & Foskett, Sevenoaks.*

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July 24.

Street Trading—Licensed Street Trader—"Removal of refuse or other services"—Charges by Borough Council—"Other services"—Ejusdem generis—London County Council (General Powers) Act, 1927 (17 & 18 *Geo.* 5, *c. xxii.*), *s.* 37.

The "other services" mentioned in s. 37 of the London County Council (General Powers) Act, 1927, are services ejusdem generis as the removal of refuse.

The appellants, a borough council, claimed payment of their charges in respect of "other services" rendered by them to the respondent, a licensed street trader, being charges in respect of the general administration of Part VI. of the Act dealing with the regulation of street trading:—

Held, that in the absence of evidence of the removal of refuse or of services ejusdem generis as the removal of refuse, the appellants were not entitled to recover.

CASE stated by a Metropolitan police magistrate.

The respondent, Henry Armstrong, was summoned to answer a complaint preferred by the appellants, the Westminster Corporation, that the amount of their charges in accordance with the by-laws as to trading in streets by licensed street traders made by them under the London County Council (General Powers) Act, 1927 (17 & 18 Geo. 5, c. xxii.), Part VI., on December 20, 1927, for the removal of refuse or for other services rendered by them in respect of the respondent's stall in Pall Mall in the City of Westminster had not been paid; and the appellants claimed in respect of twenty-eight weeks from May 28, 1928, to December 9, 1928, at 3*s.* per week for eight weeks and at 1*s.* 6*d.* per week for twenty weeks in respect of one stall for which a licence was held for six days in each week, the sum of 2*l.* 14*s.* At the hearing of the said complaint, the appellants reduced the amount of their claim to 1*l.* 16*s.*, being the amount which they alleged to be due in respect of the period of six months immediately prior to the date of the said complaint—namely, December 22, 1928.

By s. 30 of the London County Council (General Powers) Act, 1927, street traders in the Metropolis selling from a

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receptacle in a stationary position have to be licensed by the borough council. By s. 36, sub-s. 1 : " Every borough council shall in conformity with draft byelaws to be framed by the Secretary of State and so soon as may be practicable after the framing thereof make byelaws relating to the following matters (that is to say) : . . . . (*b*) the deposit and removal of refuse and the charges which may be made for removal or other services rendered by a borough council." By sub-s. 3 : " The provisions of sections 182 to 186 of the Public Health Act, 1875, as set out in the First Schedule to the Public Health (London) Act, 1891, shall apply to all byelaws made by a borough council under this section with the substitution of the Secretary of State for the Minister of Health as the confirming authority." Sect. 37 : " Any borough council may make and recover from persons licensed by them under the provisions of this Part of this Act charges for the removal of refuse or other services rendered by them not exceeding the amounts prescribed by byelaws made under this Part of this Act." Sect. 44 provided that offences against this Part of the Act could be prosecuted and fines recovered in a summary manner.

At the hearing the following facts were admitted or proved : On December 20, 1927, in pursuance of the powers conferred by the above mentioned s. 36, sub-s. 1 (*b*), contained in Part VI. of the Act, the appellants made certain by-laws as to trading in streets by licensed street traders, which were duly confirmed by the Secretary of State on February 3, 1928. By by-law 21 : " The amount of the charges which the council are authorised to make under s. 36 of the Act for the removal of refuse or other services rendered by them, shall not exceed the following weekly rates : 1*s.* in respect of each stall for which a licence is held for one day only in each week : 2*s.* in respect of each stall for which a licence is held for two days only in each week : 3*s.* in respect of each stall for which a licence is held for three or more days in each week."

The respondent is and was at all material times the holder of a licence from the appellants, granted in pursuance of the provisions of Part VI. of the Act of 1927, to sell newspapers

on weekdays only from a stall on the footway opposite No. 6 Pall Mall, which stall is not and was not situated in a recognized street market and is a stall to which the said charges apply. It is placed on the footway of a street, being a public highway, and the respondent is a licensed street trader within the meaning of the by-laws, and he had at all material times sold newspapers from the said stall. The reduced sum of 1*l.* 16*s.* claimed by the appellants had been demanded from the respondent by the appellants' street trading inspector, one William Dunstone, but the respondent refused to pay and had not in fact paid the same or any part thereof. The respondent has not at any time created or left any litter or refuse in or around his said stall and the appellants have never incurred any expense in removing refuse created by the respondent from or around the said stall.

The said William Dunstone is a street trading inspector appointed by the appellants. The appointment is a whole time appointment and his duties are wholly concerned with the adminstration of that part of the above mentioned Act which deals with the regulation of street trading and in particular with securing the observance of the said provisions of the Act and by-laws, and in ensuring that licensed street traders, including the respondent, are not subject to any interference in the exercise of their rights of trading under the said part of the said Act.

The estimated costs per annum to the appellants of the services rendered by them to street traders in the City of Westminster are as follows :—

In respect of street cleaning and removal of refuse	£2100
Administrative costs (including legal expenses, wages of the street trading inspector, postage, etc.) . . .	923
	£3023

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The estimated income per annum received by the appellants from licensed street traders in the City of Westminster is as follows :—

Fees on application for licences . .	£130
Other charges	2860
	£2990

The respondent contended that the charges which the appellants were entitled to make and recover under s. 37 of the said Act were limited to charges for the removal of refuse or similar services, and that as the appellants had not in fact performed any service for the respondent in removing his refuse they were not entitled to recover.

On behalf of the appellants it was contended that under s. 37 of the said Act they were entitled to charge all licensed street traders in the City (including the respondent) in respect of the general services, other than the removal of refuse, which they rendered to the said licensed street traders in pursuance and for the purposes of the said Act, and that they were therefore entitled to recover.

The magistrate was of opinion that the respondent's contention was right in law and he accordingly dismissed the complaint.

The question for the opinion of the Court was whether his said determination was correct in point of law.

Sydney Turner for the appellants. The council is entitled to charge the respondent with his share of the cost of the general services rendered to street traders under Part VI. of the Act of 1927, and the words "other services" in s. 37 are not to be interpreted as services ejusdem generis as the removal of refuse. It is difficult to conceive of any services ejusdem generis as the removal of refuse which the appellants could perform.

[LORD HEWART C.J. Could there not be a service of cleansing ?]

The word "services" includes service of any kind, and would include (inter alia) payment of the salaries of officers administering this part of the Act. The amounts of the charges fixed in the by-laws are maximum amounts and are in fact less than the actual cost, which seems to show that the Legislature did not intend to charge on the basis of actual services rendered.

[AVORY J. There is no evidence that any services were in fact rendered to the respondent.]

But there is evidence that services were rendered to all the street traders generally. The Act confers on street traders benefits which they did not previously possess, and part of the services rendered under the Act is the protection of those benefits by the officers of the appellants. These charges are in the nature of a rate.

[Craies on Statute Law, 3rd ed., pp. 164–5, was referred to.]

The respondent, in person, was not called upon to argue.

LORD HEWART C.J. This is a case stated, arising out of a complaint preferred by the appellants, the corporation of the City of Westminster, that the amount of the appellants' charges incurred under the by-laws with regard to licensing street traders, for the removal of refuse or for other services rendered by them in respect of the respondent's stall in Pall Mall in Westminster, had not been paid. A certain sum was claimed from the respondent. The learned magistrate, having heard the complaint, dismissed it, and the question for us is whether in so doing he came to a correct determination in point of law. The opinion of the learned magistrate was that the respondent's contention was right in law. That contention was that the charges which the appellants were entitled to make and recover under s. 37 of the London County Council (General Powers) Act, 1927, were limited to charges for the removal of refuse or similar services, and that, as the appellants had not in fact performed any services for the respondent in removing refuse, they were not entitled to recover. The terms of s. 37 are as follows: "Any borough council may make and recover from persons licensed by

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them under the provisions of this Part of this Act charges for the removal of refuse or other services rendered by them not exceeding the amounts prescribed by byelaws made under this Part of this Act." Under that section this particular council made a by-law in these terms: "The amount of the charges which the council are authorised to make under section 36 of the Act for the removal of refuse or other services rendered by them, shall not exceed the following weekly rates" and there follow rates which vary, not at all according to the nature of the business carried on, but only according to the number of days in each week in respect of which the licence is held. It was 1*s.* a week where the licence was held for one day a week; 2*s.* where the licence was held for two days a week; and 3*s.* where the licence was held for three or more days a week. No distinction is drawn between the charge for the removal of refuse and the charge for other services. The figures which are set out in the case show that the expenses are very largely incurred about street cleaning and removal of refuse. Out of a total expenditure of 3023*l.* the expenditure under that head is no less than 2100*l.*, while the expenditure for administrative costs, including the legal expenses, wages of the street trading inspector, postage, etc., is 923*l.* It seems tolerably obvious, therefore, that if the council had made two charges, one for the removal of refuse and the other for other services, the charge for the removal of refuse would have been much larger than the other charge. In the case of this particular respondent, it is found as a fact that he has not at any time created or left any litter or refuse in or around his stall, and the appellants have never incurred any expense in removing refuse created by the respondent from or around his stall. What is suggested is that he in common with others has had the advantage of administrative methods which ensure that licensed street traders shall not be subjected to any interference in the exercise of their rights of trading. Nothing is found as to the particular rendering of any such service to this respondent. In those circumstances the learned magistrate came to the conclusion that this was a case in

which the rule of ejusdem generis applied, and I am not prepared to say that so doing he came to a wrong conclusion in point of law. The words of s. 37 are interesting: "Charges for the removal of refuse or other services rendered by them." No doubt the rule about ejusdem generis must be applied with caution, and certainly it is not to be applied automatically. But this case seems to me to illustrate an observation which was used by Lord Kenyon in the case of *Rex* v. *Wallis*. (1) There the phrase which was being considered was a phrase relating to the intrusion of persons into public offices in cities, towns corporate, boroughs and places, and Lord Kenyon said: "I agree with the counsel in support of this rule, that the word 'places' in the Act only extends to offices in places of the same kind with those before enumerated; otherwise"—and this is the phrase—"the Legislature would have used only one compendious word, which would have included places of every denomination." So here, it seems to me, there is much to be said for the view that if the Legislature had not been thinking of the removal of refuse and operations similar to that, that is to say, operations of cleansing and tasks of that kind, instead of using the expression "charges for the removal of refuse or other services rendered by them," it would have been content to use the far simpler and unambiguous phrase "charges for any services rendered by them." There are other cases which might be cited of similar purport. I think, therefore, that it is not possible to say that the learned magistrate came to a wrong conclusion in point of law, and in my opinion this appeal ought to be dismissed.

AVORY J. I agree. I am not convinced by the argument of Mr. Turner that the learned magistrate was wrong in applying the ejusdem generis principle to s. 37. At first sight I think it does seem to contemplate some personal service rendered to the particular trader when it speaks of the removal of refuse or other services rendered. In this case it is not suggested that there was any evidence of any personal

(1) (1793) 5 T. R. 375, 379.

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service rendered to the trader and I doubt whether the cost of the street trading inspector or the administrative costs incurred in the execution of this Act of Parliament can properly be described as a personal service rendered to this trader. I only wish to add, although it does not arise in this case, that I think it may be a matter for future consideration whether the by-law ought not to provide separately for the charges which are to be made for removal and the charges which are to be made for any other services rendered.

BRANSON J. I agree, and I have nothing to add.

Appeal dismissed.

Solicitors for appellants: *Allen & Son.*

W. L. L. B.

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June 10.

CARPENTER *v.* FOX.

Motor Car—Locomotive on Highway—Exceeding Seven and a Quarter Tons unladen—Applicability of Motor Car Orders—Obstruction by standing on Highway—"Stand"—Locomotives on Highways Act, 1896 (59 & 60 *Vict. c.* 36), *ss.* 6, 7—*Motor Cars (Use and Construction) Order*, 1904 (*S. R. & O.*, 1904, *No.* 315), *Art. IV., cl.* 2.

By the Locomotives on Highways Act, 1896, mechanically propelled vehicles on highways below a certain weight unladen, called light locomotives, and now called motor cars, were relieved from some of the restrictions then imposed on mechanically propelled vehicles, called locomotives. By successive legislation the maximum weight of motor cars has been raised to 7¼ tons unladen or 9¾ tons with the addition of an unladen vehicle drawn thereby. Vehicles exceeding the above weights are not motor cars but heavy locomotives.

Art. IV., cl. 2, of the Motor Cars (Use and Construction) Order, 1904, forbids a "motor car or a vehicle drawn thereby to stand on [the] highway so as to cause any unnecessary obstruction thereof":—

Held, that the above article did not apply to a steam tractor weighing 13 tons unladen which while being driven on the highway caused an obstruction, inasmuch as it was not a motor car.

Held, also, that although the above tractor was in motion, being driven along the highway at the time of the commission of the offence, it was "standing" thereon within the meaning of Art. IV., cl. 2.

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CASE stated by Leicestershire justices.

At a petty sessional court holden at Lutterworth an information was preferred by George Fox, the respondent, an inspector of police, against the appellant, Nelson Carpenter, under s. 7 of the Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), for that he on November 12, 1928, at Westrill and Starmore, did unlawfully drive a certain heavy locomotive, to wit, a steam tractor, on a certain highway so as to cause an unnecessary obstruction thereof, contrary to Art. IV., cl. 2, of the Motor Cars (Use and Construction) Order, 1904 (S. R. & O., 1904, No. 315), which provides "Every person driving or in charge of a motor car when used on any highway . . . . (2.) . . . . shall not . . . . allow the motor car or a vehicle drawn thereby to stand on such highway so as to cause any unnecessary obstruction thereof."

The said information was heard on January 10, 1929, and at the hearing the following facts were proved or admitted:—

(1.) That at the material time the appellant was driving the said locomotive so as to cause an obstruction. (2.) That it was then drawing three other vehicles. (3.) That its weight by itself unladen was 13 tons, and that its weight with the three other vehicles was at least 20 tons. (4.) That at the time it was causing the obstruction it was in motion.

It was contended for the appellant: (1.) that Art. IV., cl. 2, of the above Order did not apply, and that (2.) if applicable, the Order only applied if the locomotive was standing and not in motion when causing the obstruction.

The justices convicted the appellant and fined him twenty shillings, but stated this case.

S. R. Sidebottom for the appellant. The conviction was wrong. Art. IV., cl. 2, of the Motor Cars (Use and Construction) Order, 1904, only applies to light locomotives or motor cars, and the vehicle in question was not a motor car but a heavy locomotive. Secondly, Art. IV., cl. 2, prohibits a motor car "to stand" on the highway; this vehicle was not standing but was in motion.

[LORD HEWART C.J. But it was on the highway; it was not in the air.]

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With regard to the first point. By the Locomotives on Highways Act, 1896, s. 1, sub-s. 1, it was provided, in effect, that the restrictions at that time imposed on mechanically propelled vehicles on highways, called locomotives, should not apply to such vehicles if under three tons unladen in weight, or, if drawing another vehicle, of a total weight of four tons, and the definition of "motor car" in Art. I. of the above Order of 1904 is in similar terms. By Art. II. of the Heavy Motor Car Order, 1904 (S. R. & O., 1904, No. 1809), "The expression 'heavy motor car' means a motor car exceeding two tons in weight unladen"; and Art. III. provides that a heavy motor car may be used on a highway if the weight unladen does not exceed 5 tons or with an unladen vehicle drawn by it, $6\frac{1}{2}$ tons, thus increasing the previously permitted weights of 3 and 4 tons respectively. Then by Art. I. of the Heavy Motor Car (Amendment) Order, 1921 (S. R. & O., 1921, No. 906), these weights were respectively increased to $7\frac{1}{4}$ tons and $9\frac{3}{4}$ tons respectively. But these locomotives still remained motor cars. Any locomotives exceeding the above maximum weights remained locomotives within the Act of 1896 and any Orders regulating them. The Order under which this prosecution was launched was made under s. 6, sub-s. 1, of the Act of 1896, which authorized the making of regulations "with respect to the use of light locomotives on highways." Therefore it does not apply to heavy locomotives but to motor cars only. It may be that an offence has been committed, but this prosecution is misconceived.

Granville Sharp for the respondent. The conviction was right. By s. 12 of the Locomotive Act, 1861 (24 & 25 Vict. c. 70): "All the clauses and provisions of any general or local Acts relating to . . . . highways shall, so far as the same are not expressly altered or repealed by or are not inconsistent with the provisions of this Act, apply to all locomotives propelled by other than animal power. . . . ." Art. IV., cl. 2, of the Motor Cars (Use and Construction) Order, 1904, by the rules of interpretation is a clause or provision of a general Act relating to highways, being framed under the authority conferred by s. 6, sub-s. 1,

of the Locomotives on Highways Act, 1896, and there is nothing in that Order inconsistent with the provisions of the Act of 1861. It is true that in terms the Order applies to vehicles of less weight than the one in question, but, being consistent with the Act of 1861, it applies to "all locomotives propelled by other than animal power." Being intended to apply to vehicles of light weight, as to which up to that time no regulations applied, the Order applies a fortiori to the heavier vehicles concurrently with other Orders which regulate their use and construction.

Sidebottom replied.

LORD HEWART C.J. This is a case stated by justices, and the question which is involved arises out of an information preferred by the present respondent against the present appellant under the Locomotives on Highways Act, 1896. The information alleged that on November 12 last the appellant unlawfully did drive a certain heavy locomotive —namely, a steam tractor—on the highway, so as to cause an unnecessary obstruction of the highway contrary to Art. IV., cl. 2, of the Motor Cars (Use and Construction) Order, 1904. The justices having heard the information convicted the appellant and fined him. The question for this Court is whether in so deciding the justices came to a correct determination in point of law.

The facts are extremely simple. A heavy locomotive was in fact being driven on the highway and was being driven in such a way as to cause obstruction. But the weight of this locomotive unladen was 13 tons and with its three vehicles unladen the total weight came to 20 tons.

In those circumstances it was contended on the part of the appellant among other things that Art. IV., cl. 2, of the Motor Cars (Use and Construction) Order, 1904, did not apply to a heavy locomotive or to a heavy locomotive drawing those vehicles: in other words, the contention was not that what had been done was within the law but that the prosecution had been launched under a part of the law which was not applicable. A further contention, which has been only faintly

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indicated in the arguments here, is that the heavy locomotive was not standing but moving. But the learned counsel for the appellant has I think recognized that that is not a very strong point.

The real question is whether it is true to say that a heavy locomotive of the weight unladen of 13 tons, or with its three trailers, 20 tons, comes within the ambit of that part of the law under which this prosecution was launched. That law is contained in certain statutes and regulations made under them. Before the year 1896 there were very stringent regulations as to the movement of locomotives on highways, but in that year the Locomotives on Highways Act, 1896, provided in the case of a limited class of vehicles, spoken of as light locomotives, that some of these restrictions upon locomotives should not apply, and in particular it was provided by s. 1, sub-s. 1, that the enactments mentioned in the Schedule, which included the Locomotive Act, 1861, and part of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), "shall not apply to any vehicle propelled by mechanical power if it is under three tons in weight unladen, and is not used for the purpose of drawing more than one vehicle (such vehicle with its locomotive not to exceed in weight unladen four tons)." Then there followed a provision as to its construction: "and is so constructed that no smoke or visible vapour is emitted therefrom except from any temporary or accidental cause." In other words, at that time a vehicle in order to get out of the provisions relating to locomotives, simply so called, and to come within the protection of the light locomotive, had to be under three tons in weight unladen; and by s. 6, sub-s. 1, of that Act it was provided that the Local Government Board might make regulations in respect of the use of "light locomotives on highways." Accordingly the Motor Cars (Use and Construction) Order, 1904, was made, and under that Order the definition of "motor car" was as follows: Art. I. "The expression 'motor car' means a vehicle propelled by mechanical power which is under 3 tons in weight unladen, and is not used for the purpose of drawing more than one

vehicle (such vehicle with its locomotive not exceeding in weight unladen 4 tons)." Then follows the provision about construction (Art. II.). Afterwards, when experience was thought to show that the exemption of vehicles of a particular construction might be extended, there came the Motor Car Act, 1903 (3 Edw. 7, c. 36), and by s. 12, sub-s. 1, of that Act it was provided: "The Local Government Board by regulations made under section six of the principal Act may, as respects any class of vehicle mentioned in the regulations, increase the maximum weights of three tons and four tons mentioned in section one of that Act, subject to any conditions as to the use and construction of the vehicle which may be made by the regulations." Accordingly regulations were made under that Act, which were called the Heavy Motor Car Order, 1904. By that Order "heavy motor car" was defined in Art. II. as a motor car exceeding two tons in weight unladen; and by Art. III. it was provided that: "Notwithstanding anything in the Motor Car Acts, 1896 and 1903 . . . . a heavy motor car may be used on a highway if the weight of the heavy motor car unladen does not exceed five tons, or if the weight of the heavy motor car unladen with the weight of an unladen vehicle drawn by it does not exceed $6\frac{1}{2}$ tons." After the making of that regulation therefore vehicles which satisfied the definition of a heavy motor car and did not exceed those weights were outside the category of ordinary locomotives on highways and came within the category of motor cars. Finally by the Heavy Motor Car (Amendment) Order, 1921, it was provided by Art. I. that the previous Orders should have effect as if the words "$7\frac{1}{4}$ tons" were substituted for 5 tons, and "$9\frac{3}{4}$ tons" were substituted for $6\frac{1}{2}$ tons.

In other words, by successive stages, partly by statute and partly by regulations, the weight of vehicles which ceased to be in the class of ordinary locomotives and came to be in the special class of motor cars, with their privileges on the one hand and their restrictions on the other hand, has been gradually raised from 3 tons to the extreme limit mentioned in the Order of 1921. But it has never yet been raised to

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anything like the weight of 13 tons for the unladen locomotive; and it seems to me, therefore, that these large vehicles never came within either the protection or the special restrictions imposed by the Motor Car Orders. That is not to say that a vehicle of this kind enjoys a greater latitude; in fact it enjoys latitude which is far less. But, if it is to be prosecuted for that which was being done here, it is essential that that prosecution should be launched under the right statute. The argument seems to be that because the restrictions contained in these regulations are applicable to motor cars properly so called—that is motor cars not exceeding the weight prescribed by regulation —therefore a fortiori they are applicable to vehicles which exceed those weights. That argument, with all due respect to the learned counsel who put it forward, seems to me to be a complete non sequitur. It is as if one were to say that because a statute applies to a dog, which may be a little fox terrier, it must apply much more to a horse, which is a much larger animal. The answer is that the two things are on different planes, and the law relating to the one may be found in quite a different place from the law relating to the other.

I have come to the conclusion that the argument for the appellant is sound and that this prosecution, although it had many merits of other sorts, was entirely misconceived; and I think therefore that the unmeritorious appellant is entitled to succeed here.

AVORY J. I agree, on the ground that Arts. II. and XVI. of the Heavy Motor Car Order, 1904, on which the justices appear to have relied, have no application to this heavy locomotive. In order to bring it within either Art. II. or Art. XVI. it would have to be shown that it was a heavy motor car, whereas in fact it was a heavy locomotive and not a heavy motor car at all. I agree that the appeal should be allowed.

SWIFT J. I am quite satisfied that this vehicle is not within the protection of the statutes, beginning in 1896, which have

rendered certain vehicles upon the road immune from particular restrictions. It is not a motor car at all. In those circumstances I agree that the appeal should be allowed.

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Appeal allowed.

Solicitors for appellant: *Joynson-Hicks & Co.*
Solicitors for respondent: *Burch & Co., for Watson & Son, Lutterworth.*

W. L. L. B.

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